Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

PAUL S. MINOR,

Petitioner,

v.

K-MART CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

E. BARRETT PRETTYMAN, JR.
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5685
Of Counsel

LUTHER T. MUMFORD*
MICHAEL B. WALLACE
PHELPS DUNBAR L.L.P.
P. O. Box 23066
Jackson, MS 39225-3066
(601) 352-2399

* Counsel of Record

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. In light of First Amendment principles and the duty to zealously represent clients, can an attorney be sanctioned for having an "improper purpose" under Fed. R. Civ. P. 11(b)(1) because the attorney took the press to a partial execution of a judgment on a defendant's property and made non-slanderous statements that embarrassed the defendant?

2. If an attorney satisfies Fed. R. Civ. P. 11(b)(2) by properly obtaining a writ of execution to collect money for his client, can he be sanctioned under Fed. R. Civ. P. 11(b)(1) for also having alleged improper purposes?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Paul S. Minor respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit on the merits is reported at *Whitehead v. Foodmax of Mississippi, Inc.*, 163 F.3d 265 (5th Cir. 1998), and reproduced in the Appendix ("App.") at 69a. The opinion of the District Court on sanctions is reported at *Whitehead v. K Mart*, 202 F. Supp. 2d 525 (S.D. Miss. 1999) and reproduced at App. 53a. The opinion of the Fifth Circuit Panel on sanctions is reported at *Whitehead v. Foodmax of Mississippi, Inc.*, 277 F.3d 791 (5th Cir. 2002), and

Panel on sanctions is reported at *Whitehead v. Foodmax of Mississippi, Inc.*, 277 F.3d 791 (5th Cir. 2002), and reproduced at App. 32a. The opinion of the Fifth Circuit en banc court on sanctions is reported at *Whitehead v. Foodmax of Mississippi, Inc.*, 332 F.3d 796 (5th Cir. 2003) (en banc), and reproduced at 1a.

Whitehead v. Foodmax of Mississippi, Inc., 163 F.3d 265 (5th Cir. 1998)

Whitehead v. K Mart, 202 F. Supp. 2d 525 (S.D. Miss. 1999)

Whitehead v. Foodmax of Mississippi, Inc., 277 F.3d 791 (5th Cir. 2002)

Whitehead v. Foodmax of Mississippi, Inc., 332 F.3d 796 (5th Cir. 2003) (*en banc)*

JURISDICTION

Respondent Kmart removed this case from state court to federal district court on the basis of diversity jurisdiction, 28 U.S.C. § 1332. Petitioner Minor timely appealed the sanctions ruling after the district court denied post-trial motions. *See Cunningham v. Hamilton County*, 527 U.S. 198 (1999).

The *en banc* court issued its decision on May 29, 2003 and denied *en banc* rehearing by an order entered July 17, 2003. App. 102a. This petition is filed within 90 days of both the *en banc* decision and the *en banc* court's denial of rehearing and so is timely under 28 U.S.C. § 1254(1) and Sup. Ct. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the United States Constitution:

Congress shall make no law . . . abridging the freedom of speech. . . . or the right of the people . . . to petition the Government for a redress of grievances.

Fed. R. Civ. P. 11(b)(1) and (2):

> **(b). Representations to Court.** By presenting to the court . . . a pleading, written motion, or other paper, an attorney. . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, –
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

STATEMENT OF THE CASE

This petition presents two important issues in the interpretation of Fed. R. Civ. P. 11(b). The first is the definition of "improper purpose" and whether it encompasses an intent to embarrass an opposing party and publicize a lawyer's success in court. The second concerns the relationship between the no improper purpose requirement of Rule 11(b)(1) and the meritorious pleading requirement of Rule 11(b)(2), *i.e.*, what weight, if any, should be given to the merits of a pleading when judging whether or not it has an improper purpose. There are significant circuit conflicts on both of these issues.

THE MERITS CASE

Three people brought this premises liability case against respondent Kmart Corporation: a mother who was abducted from a Kmart parking lot and raped; her daughter, who was forced to witness the rape; and her husband, who suffered a loss of consortium. At the first trial in 1997 the jury awarded $3.4 million in medical and psychological damages to the plaintiffs.

On appeal, the Fifth Circuit affirmed on liability, but reversed for a new trial on damages. App. 69a.[1] In 1999 the parties retried the case on damages only. The jury returned an award of $5 million in damages against Kmart. The merits case then settled on appeal.

THE SANCTIONS CASE

After entry of the $3.4 million judgment on May 27, 1997, Kmart had 10 days to bond the judgment or suffer execution without further notice. Fed. R. Civ. P. 62(a); 33 C.J.S. *Executions* §§ 38, 60. Within that period, Kmart moved for a new trial only and sought a stay of execution from the district court pending consideration of its new trial motion. *See* Fed. R. Civ. P. 62(a), (b). The plaintiffs' attorney, petitioner Paul S. Minor, opposed Kmart's requested stay of execution and on June 3, 1997 wrote Kmart a letter inviting it to discuss settlement so it would not have to post a supersedeas bond. Kmart, however, refused to respond to that letter, would not return Mr. Minor's subsequent phone calls on that subject, and so precluded any discussion of security or settlement.

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[1] Foodmax of Mississippi, Inc. was originally named as a party defendant because it owned the property occupied by Kmart. However, Foodmax was subsequently granted summary judgment and is no longer a party.

Minor, however, refrained from executing while the district court had the new trial and stay motions under consideration. On August 18, 1997 the district court denied a new trial and simultaneously denied Kmart's request for stay of execution.

Minor was aware that a year earlier in *Moses v. K-mart*, 922 F. Supp. 600 (S.D. Fla. 1996), *aff'd*, 136 F.3d 140 (11th Cir. 1998), Kmart, which had experienced a brush with bankruptcy, had ignored a judge's order to post a supersedeas bond with the result that the plaintiff's lawyer in that case levied on the Kmart cash registers. The *Moses* court ruled that plaintiffs and counsel were entitled to keep the money pending appeal because when a stay expires, it is a "race" to "seize assets to secure a judgment." 922 F. Supp. at 604.

Three days after denial of the new trial motion, but still not having heard from Kmart's counsel, Minor obtained a writ of execution from the district court and executed on the cash at the Kmart store outside which the abduction had taken place. He notified the news media before he did so. His statements to the press demanded that Kmart pay the plaintiffs the money it then owed them. As summarized by the dissenting panel judge who ultimately wrote the *en banc* opinion, Minor:

> [c]haracterized Kmart's actions as arrogant and outrageous and asserted it would not pay the judgment; charged his clients had been victimized twice by Kmart, once by being abducted there, and once by Kmart's not paying the judgment; and proclaimed he was there to ensure Kmart did what it was supposed to do.

App. 43a-44a. At Kmart's request, Minor halted the execution and then spoke to Kmart's general counsel, who said that he thought a bond had already been filed to stay the judgment. After a telephone hearing with the district court, Kmart filed a bond and so obtained a stay pursuant to Fed. R. Civ. P. 62(d).

Kmart then moved in the district court to sanction Minor on the ground that he had no legal right to execute on the judgment on August 21. Kmart also contended that Minor had acted with a purpose to embarrass Kmart and publicize himself.

Minor filed an affidavit stating his purposes as follows:

> I obtained a writ of execution and fieri facias from the district court clerk on August 21, 1997, because Kmart's motions for new trial, for remittitur and stay of execution had been denied; it had not posted a supersedeas bond or filed an application for an additional stay under Rule Fed. R. Civ. P. 62(f); nor would it return my phone calls and letter concerning settlement discussions. Therefore, in order to protect the rights of my clients, I felt that I should take possession of assets that would secure at least some portion of the judgment in favor of my clients. I was aware of the seizure approved in *Moses v. Kmart Corp.*, 922 F. Supp. 600 (S.D. Fla. 1996), *aff'd* 19 F.3d 10 (11th Cir. 1997), and was concerned that Kmart, who is "self-insured" in this case, had not posted a timely supersedeas bond because of financial concerns.[2]

For the proposition that Kmart could not have a Rule 62(f) stay in federal court without filing a motion and obtaining a stay order from the federal court, Minor stated that he had relied on *Van Huss v. Landsburg*, 262 F. Supp 867 (W.D.

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[2] While proceeding on appeal from the sanctions order in 2000, Minor learned that, contrary to his understanding at the time of execution in 1997, Kmart did have partial insurance coverage. It had thus not spoken truthfully when it told both parties and the district court, in discovery and in later settlement discussions, that it was "self insured." In a motion filed in the Fifth Circuit, Minor said he would not have executed on the Kmart cash registers in 1997 if he had known about the insurance. See Motion for Summary Reversal or Remand, filed February 23, 2001.

Mo. 1967), and 11 C. Wright, A. Miller, and M. Kane, *Federal Practice and Procedure* § 2907 (2d ed. 1995).

Minor also contended that Kmart had wholly failed to prove that it had property in Mississippi to which a judgment lien would attach.[3] Minor further argued, by quoting from *Sussman v. Bank of Israel*, 56 F.3d 450, 459 (2d Cir.), *cert. denied*, 516 U.S. 916 (1995), and J. Moore, *Federal Practice* § 11.11[8][c] (1997), that in light of First Amendment concerns, neither embarrassment to a defendant nor publicity-seeking should be an improper purpose under Rule 11 (b)(1):

> It is not the role of Rule 11 to safeguard a defendant from public criticism that may result from the assertion of nonfrivolous claims. Further, unless such measures are needed to protect the integrity of the judicial system or a criminal defendant's right to a fair trial, a court's steps to deter attorneys from, or to punish them for, speaking to the press have serious First Amendment implications.

56 F.3d at 459.

The district court, after holding the matter until the decision on the first appeal, sanctioned Minor under Rule 11. The court concluded that the authorities on which Minor had relied were distinguishable. It decided, as a matter of first instance in the United States, that a party could have a Rule 62(f) stay in federal court without asking for one. App. 66a. It then sanctioned Minor for having "no basis . . . in fact or in

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[3] Kmart had no real estate in Mississippi. In that state a judgment does not impress a lien on personal property until execution, *Willis Hardware Co. v. Clark*, 61 So. 2d 441 (Miss. 1952). The Fifth Circuit was incorrect when it said that Minor did not raise this issue in the district court, see n. 7, *infra*. The district court even discussed it, although its opinion ignores *Willis Hardware*. *See* App. 57a-58a.

law" for the execution. From this it concluded that his purposes must have been improper:

> It is clear from these unchallenged submissions [a newspaper article and a video tape] that [Minor] was seeking to embarrass [Kmart] and call attention to himself as a tireless laborer of the bar attempting to obtain justice for his client when, in fact, there was no basis whatsoever in fact or in law for the actions taken on August 21, 1997.

Id.

A Fifth Circuit panel, in an opinion by former Chief Judge Henry Politz, reversed the district court's sanctions award. It ruled that Minor had acted properly in obtaining the writ of execution from the district court and levying on Kmart's cash registers because Kmart had never sought a stay of the judgment against it – a necessary step under Rule 62(f). App. 36a-39a. It said it could not find any authority to support the district court's contrary conclusion. *Id.* at 37a. *See also FDIC v. Ann-High Assoc.*, 1997 WL 1877195, 39 Fed. R. Serv. 3d 684 (2d Cir. 1997) (judgment debtor must prove entitlement to Rule 62(f) stay).

With respect to the alleged improper purposes, the panel said:

> Finally, we conclude that any embarrassment suffered by Kmart as a result of Minor's methodology in executing the judgment at the store is insufficient to justify sanctions under Rule 11. Minor sought to execute on a final judgment for his client. He appropriately sought and obtained a Writ of Execution in accordance with the federal rules. Absent exceptional circumstances, the court should not read an ulterior motive into a document filed for a legitimate purpose because "[i]t is not the role of Rule 11 to

> safeguard a defendant from public criticism that may result from the assertion of non-frivolous claims."

App. at 41a (quoting *Sussman v. Bank of Israel*, at 459).

Dissenting Judge Rhesa H. Barksdale did not dispute the panel's summary of relevant authority, but described the panel's treatment of the Rule 62(f) motion as "unnecessary." *Id.* at 47a-51a. Characterizing the district court's comments concerning purpose as "independent" from the merits, he found it sufficient to support the sanctions award that the district court had held that the writ request was motivated by improper purposes.

Kmart moved for panel rehearing and *en banc* rehearing was granted. The *en banc* court then voted 11 to 3 to reverse the panel and reimpose the sanctions. App. 19a. The dissenting judge on the panel, Judge Barksdale, authored the majority *en banc* decision.[4] *Id.* at 1a.

The majority and the dissenters briefly touched on the merits of the writ, but their discussion is irrelevant to this petition because the majority said it would assume, for purposes of its decision on sanctions, that "Minor did not violate subpart (b)(2)" of Rule 11. App. 10a. In other words, Minor had properly certified that to the best of his knowledge, the legal contentions he had presented in obtaining the writ of execution and levying were warranted by existing law.

The majority nevertheless concluded that he had separately violated Rule 11(b)(1) because he had acted with improper purposes. The two subparts of Rule 11 were not "intertwined;" rather, subpart (b)(1) was "independent from any inquiry under subpart (b)(2)." *Id.* at App. 10a-13a and

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[4] Former Chief Judge Politz, who had authored the panel's majority opinion, passed away before the case was voted *en banc*.

n.4. Thus, "the fact-driven improper purpose ruling can be sustained even if (as we assume for our analysis) there was a basis in law for Minor's obtaining the writ." *Id.* at 13a.

The court was willing to accept that Minor had a purpose to collect money for his client. *Id.* at 13a-15a. The two improper purposes, it said, were trying "to embarrass Kmart" and "advance his personal position." *Id.* at 18a. "Embarrassment," said the majority, was equivalent to an attempt to "harass," which was specifically included in subpart (b)(1). *Id.* at 15a-16a.

The court rejected out of hand Minor's claim that "embarrassment" should not be an improper purpose because practically every step in litigation embarrasses the opposing party, from the filing of a complaint to the conclusion of an appeal. *Id.* at 15a. It dismissed this argument as "regrettabl[e]." As to First Amendment considerations, it incorrectly suggested that Minor had not mentioned them in the district court, but went on to say that Minor's statements were "improper" and in any event the media were simply the vehicle for implementing Minor's improper purpose and not the purpose itself. *Id.* at 16a. "The collateral media play simply constitutes objective evidence of [the] improper purpose." *Id.* at 17a.

The three dissenters, in an opinion by Chief Judge Carolyn Dineen King, thought that the majority's ruling was "directly at odds with our precedent" and "a serious mistake, now bad law." *Id.* at 22a. The dissent quoted with approval a prior Fifth Circuit case: "If a reasonably clear legal justification can be shown for the filing of the paper in question, no improper purpose can be found and sanctions are inappropriate." *Id.* at 23a-24a (quoting *National Ass'n of Gov't Employees, Inc. v. National Fed'n Of Fed. Employees*, 844 F.2d 216, 223-224 (5th Cir. 1988)). It also cited cases from other Circuits. *Id.* at 25a-27a.

The dissent could not find in the district court's opinion any discussion or finding as to legitimate or proper purposes Minor might have had, whereas if there were such purposes, the proper and improper purposes would have had to be balanced. *Id.* at 24a-25a. It pointed out that the majority had attributed to the district court "findings" that the district court in fact had never made. It also said that "embarrass" was not the same as "harass," and the district court had not so found. *Id.* at 25a-27a. In addition, "an intent to embarrass one's opponent and an intent to obtain publicity for oneself" were "both quite common characteristics in a judgment or debt collection." *Id.* at 28a. Even though Minor's "technique here is colorful to say the least" and "perhaps in poor taste," it "does not merit sanctions under Rule 11 (b)(1)." *Id.* at 28a-30a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari in this case in order to resolve conflicts between the Circuits in interpreting the first two subsections of Rule 11 and to protect attorneys' zealous representation of their clients and their right to speak out on public issues. Sanctions are a powerful tool of the courts, which must exercise "extreme caution" in imposing them on attorneys. Advisory Committee Note to 1983 Amendment to Rule 11; *Larez v. Holcomb*, 16 F.3d 1513, 1522 (9th Cir. 1994).

The Fifth Circuit, however, threw that caution to the wind. In its zeal to promote professionalism, it adopted an interpretation of Rule 11 that will have the opposite effect. Its broad and vague interpretation of the rule invites internecine warfare not between the parties, but between their lawyers.

The Fifth Circuit's opinion exacerbates at least two Circuit Conflicts. First, the Circuits are divided as to whether an intent to embarrass or seek publicity can be an "improper purpose" under Rule 11, given that these intentions are part of the warp and woof of adversary litigation in our democratic society. Second, the Circuits are divided as to whether the merit of a pleading is relevant or irrelevant to a determination of improper purpose. By broadly defining "improper purpose" and stripping it of any connection to the merits, the Fifth Circuit converted the "improper purpose" prong of Rule 11 into a weapon available to any and all who might want to use it, as well as a serious deterrent to communications between counsel and the press.

The Court long has recognized and protected attorneys' obligations to advocate with zeal, creativity, and vigor. For this reason, the Court has been loath to allow attorneys to be sanctioned for their advocacy, even where the Court disagrees with their conduct. At the heart of these rulings is a deep regard for attorneys' rights to free speech, a recognition that the hurly burly of litigation may lead to legitimate advocacy in many forms, and a further recognition that making an attorney personally liable for actions taken to advance the interests of a client puts the attorney in conflict with the client and chills the zealous advocacy on which the adversary system depends.

I. "Improper purpose" should be interpreted in light of an attorney's duty to zealously represent his clients and his right to speak to the press.[5]

a. The need for a workable standard. Minor argued below that a purpose to embarrass or to publicize an attorney's success should not be a Rule 11 improper purpose, because such a standard would cover too many circumstances and yet be so vague as to fail to give an attorney fair notice as to whether or not the attorney was violating the Rule. In doing so he relied on *Gentile v. State Bar of Nevada*, 501 U.S. at 1082, which the Fifth Circuit did not address.

In *Gentile*, this Court held that the Nevada Bar could not punish an attorney for statements made to the news media because the relevant ethical rule, which allowed statements about the "general nature of the defense," was unconstitutionally vague. It said the "lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborate." *Id.* The same is true of the Fifth Circuit's Rule 11 interpretation in this case.

The Second Circuit in *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 80 (2d Cir. 2000), applied this principle to an

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[5] Minor did not and does not contend that Rule 11 on its face violates the First Amendment. Rather his position was and is the same as the court's in *Sussman*, *supra* – that in light of First Amendment considerations, Rule 11 should not be used to sanction lawyers for speaking to the press. Thus, in his district court brief (pp. 12-13) and original brief to the panel (pp. 21-22), Minor quoted from *Sussman* about these serious First Amendment implications, and in both his Answer in Response to Petition for Panel Rehearing (pp. 10-11) and his brief to the *en banc* panel (p. 15), he devoted a paragraph to the same subject, citing both *Sussman* and *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), for the proposition that "embarrassment" was too broad and vague a test for sanctions in light of the First Amendment considerations. See also n. 7, *supra*.

attempt to sanction an attorney for seeking publicity. It said airing grievances in the press and threatening litigation through letters "are commonplace. . . .[t]he court's concern that [plaintiff] had in fact tarnished [defendant's] reputation by speaking with a news reporter was not a proper basis for sanctions" under Rule 11. *Id.*

The Fourth Circuit in *In re Kunstler*, 914 F.2d 505, 520 (4th Cir. 1990), *cert. denied*, 499 U.S. 969 (1991), said:

> Holding a press conference to announce a lawsuit, while perhaps in poor taste, is not grounds for a Rule 11 sanction, nor is a subjective hope by a plaintiff that a lawsuit will embarrass or upset a defendant, so long as there is evidence that a plaintiff's central purpose in filing a compliant was to vindicate rights through the judicial process.

b. The threat to First Amendment values. The Second Circuit has made its polestar the principle that attorneys are free to speak to the press about cases unless the speech would harm the integrity of the judicial process, i.e., interfere with fair trial rights. That was also the ground on which all of this Court's Justices stood in *Gentile*, 501 U.S. at 1054-58. The debate there was about how likely the danger of material prejudice had to be, not whether material prejudice was the proper test. The five justice majority on the First Amendment issue thought the likelihood could be low, but also said that it ended when the trial was over. *Id.* at 1070. The other four justices would have required a showing of "real or specific threat to the legal process" to overcome free speech rights because: "If the dangers of their speech arise from its persuasiveness, from their ability to explain judicial proceedings, or from the likelihood the speech will be believed, these are not the sort of dangers that can validate restrictions." *Id.* at 1057-1058.

In the leading Second Circuit case, *Sussman v. Bank of Israel*, 56 F.3d at 459, an attorney wrote letters to defendants threatening to file a "sensational complaint" in New York unless a dispute was settled. The attorney also gave "adverse publicity" about the defendants to the press. The Second Circuit found no danger of prejudice to the integrity of the judicial process and so found that the lawyer's speech should not be sanctioned in light of First Amendment considerations. It added: "It is not the role of Rule 11 to safeguard a defendant from public criticism that may result from the assertion of nonfrivolous claims." *Id.* Thus, "the filing of the complaint with a view to exerting pressure on defendants through the generation of adverse and economically disadvantageous publicity" does not reflect an improper purpose, unless the complaint lacks foundation in law or fact. *Id.*

In sum, Minor properly obtained a lawful writ of execution, took marshals and the media to the Kmart store where the harm to his clients had been done, and excoriated Kmart for its conduct as he executed on the writ. To interpret Rule 11 as allowing sanctions for this protected conduct, as the majority did below, is a gross perversion of that powerful tool and requires reinterpretation by this Court.

II. There should be a relationship between "improper purpose" and the merits of a pleading.

Rule 11, as originally enacted in 1938, was largely ignored. It came to life when amended in 1983. *See Childs v. State Farm Mut. Auto. Ins. Co.*, 29 F.3d 1018, 1023 (5th Cir. 1994).[6] The Rule was further amended in 1993, but its basic provisions as relevant here remained largely the same.

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[6] The 1983 amendments read: "The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that . . . it is well grounded in fact and is warranted by existing law or a good faith argument for

Conflicts developed both under the 1983 and 1993 amendments to Rule 11 over whether sanctions can be imposed for filing a document which is adequately researched and well grounded in fact and law but which has an improper purpose. Numerous treatises and articles recognize this Circuit conflict.[7] The Circuits have taken three different positions:

a. Some circuits say no relationship. The Seventh Circuit has supported the ruling of the *en banc* court below that improper purpose sanctions can be imposed even if the pleading is meritorious and has a proper purpose.

Thus, in *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988), the Seventh Circuit ruled that the district court should examine a lawyer's motives even if he had an objectively sufficient basis for filing the pleading. This was because Rule 11 "has a subjective component" as well as objective one. *Id.* at 1083. The court said the district court was wrong if it thought that "pre-filing investigation and

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the extension, modification, or reversal of existing law, *and* that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" (emphasis added).

[7] See G. Joseph, *Sanctions: The Federal Law of Litigation Abuse*, 218-19 (2000) ("there is a split among the circuits as to whether sanctions may be imposed for the filing of a meritorious paper for an improper purpose."); J. Moore, *Federal Practice* § 11.11[8][v] (2003)("courts disagree on the questions of whether sanctions may be imposed for filing a well founded document for an improper purpose); J. Solovy, *Sanctions Under Rule 11*, 69 PLI/LIT 235, at 310-321 ("before the 1993 amendment, the courts were split over the questions of whether a lawyer or party can be sanctioned for filing a well founded complaint for improper purposes. This split has continued unresolved"); C. Andrews, *Jones v. Clinton: A Study in Politically Motivated Suits, Rule 11, and the First Amendment,* 2001 B.Y.U. L. Rev. 1, 25-34 (2001) (describing different positions Circuits have taken).

subjective intent were irrelevant if the complaint formally frames an acceptable legal theory." *Id.* The court concluded that because the Rule requires an attorney to certify both that the pleading has merit and that it does not have "any improper purpose," these are entirely separate inquiries. *See also Lancellotti v. Fay*, 909 F.2d 15, 19 (1st Cir. 1990) ("reasonable inquiry" and "improper purpose" should not be merged so as to allow a pure heart to excuse an empty head).[8] In other words, a lawyer could even have a decision from this Court directly supporting his legal position and yet still be sanctioned if his "purpose" was deemed improper.

b. Other circuits say merit means no improper purpose. Other courts, however, have taken an entirely different view of Rule 11. They feel that the "improper purpose" and "well-founded pleading" subsections of Rule 11(b) are intertwined, in the sense that if a pleading passes muster under Rule 11(b)(1), there should be no further inquiry into purposes pursuit to Rule 11(b)(2). They also feel that the standard in determining purpose is entirely objective.

The Ninth Circuit since the *en banc* case of *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1990), has said that "determination of improper purpose must be supported by the determination of frivolousness . . . ." *Id.* at 1362.[9]

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[8] The Eighth Circuit has not ruled directly on the issue but has affirmed trial courts that have said sanctions can be imposed for improper purposes alone. *E.g., Perkins* v. *General Motors Corp.*, 129 F.R.D. 655, 658 (W.D. Mo. 1990), *aff'd*, 965 F.2d 597 (8th Cir. 1992); *Bryant v. Brooklyn Barbeque Corp.*, 130 F.R.D. 665, 670 (W.D. Mo. 1990), *aff'd*, 932 F.2d 697 (8th Cir. 1991).

[9] *See also Harcourt Brace Jovanovich Legal & Prof'l Publ'ns v. Multistate Legal Servs.*, 26 F.3d 948, 953 (9th Cir. 1994) *cert. denied*, 516 U.S. 1044 (1996) (principle applies to both complaint and contempt motion). *Cf. Golden Eagle Dist. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540-41 (9th Cir. 1986) (interpreted in *Townsend*, 929 F.2d at 1362-63, to mean that if there is a colorable

The Second Circuit in *Sussman* followed *Townsend*. After the attorney threatened to, and did, file a "sensational complaint," the district court dismissed for forum non conveniens and imposed sanctions on the attorney for a "manifestly improper purpose." *See* 56 F.3d at 455. The Second Circuit reversed, holding that as a matter of law, a complaint well-founded in fact and law, even if dismissed and even if partially filed for bad motives, could not result in sanctions. Moreover, said the court, neither the threat to file in New York nor the adverse publicity was in fact an improper purpose. Similarly, prelitigation letters airing grievances and threatening litigation are commonplace, sometimes with salutary effects, and were not sanctionable. *Id.* at 459.[10]

And the Tenth Circuit in *Burkhart v. Kinsley Bank*, 852 F.2d 512, 515 (10th Cir. 1988), ruled that an accusation of harassment was "subsumed" by the language of Rule 11(b)(2) and added:

> In other words, if counsel filed an amended complaint which was "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law," then any suggestion of harassment would necessarily fail.

These Circuits follow an earlier influential article by Judge William Schwarzer,[11] which reasoned that if a pleading has merit, viewed objectively, it has a proper purpose which is sufficient to meet the standards of the Rule.

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claim and the attorney relies on an unsupportable legal theory when a supportable one exists too, he cannot be sanctioned).

[10] *See also Revson*, 221 F.3d at 79 (similar analysis under 28 U.S.C. § 1927).

[11] W. Schwarzer, *Sanctions Under the New Federal Rule 11 – A Closer Look*, 104 F.R.D. 181 (1985).

c. Still other Circuits weigh the relationship between merits and purpose. A third view is that a well-pleaded document should not result in sanctions except that under "unusual circumstances," an improper purpose can justify such sanctions. That was the test the panel here used. The *en banc* dissent took that analysis a step further and argued that proper and improper purposes should be balanced:

It quoted the following test from *Kunstler*, 914 F.2d at 518:

> [I]f a complaint is filed to vindicate rights in court, and also for some other purpose, a court should not sanction counsel for an intention that the court does not approve, so long as the added purpose is not undertaken in bad faith and is not so exclusive as to eliminate a proper purpose.

App. 25a (emphasis deleted). It reasoned that, in light of both *Sussman* and *Kunstler*, Minor's "added purpose" here was not sanctionable.

d. The importance of the question. A ruling that an attorney is subject to sanctions for a filing made for a partly improper purpose, even if primarily made for perfectly proper reasons, could have an extraordinary adverse impact on the legal profession. Many valid complaints, supported both in law and by the facts, are properly filed to vindicate the rights of the client, but may also have other elements driving them that could be deemed "improper." If a lawyer runs the risk of sanctions because of these subsidiary "improper" motives, he will hesitate to vindicate his clients' rights.[12]

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[12] One study showed that a significant percentage of lawyers polled said that Rule 11 itself had deterred them from filing meritorious claims. G. Hess, *Rule 11 Practice in Federal and State Court: An Empirical Comparative Study*, 75 Marq. L. Rev. 313, 336, 341, 351 (1992).

And so here, it is clear that Minor's purpose was expressly, primarily and objectively to help his client collect money sooner rather than later or not at all. He had a court order to support what he did. But even if it were otherwise, there should be nothing wrong with such motives as spite, revenge, anger, competitive advantage, a desire to embarrass, self-aggrandizement, etc., if they drive a party lawfully to win a legitimate case and collect a proper judgment. As the late Judge Alvin B. Rubin has written, it is too much to demand that litigants come to a dispute with "an undiluted desire for just deserts."[13] So even if Minor also had a purpose to embarrass Kmart and publicize himself, that could hardly overcome or vitiate the basic validity of what he did. At the very least, as the dissenters below pointed out, the proper and "improper" purposes had to be weighed against each other – which neither the district court nor the *en banc* court did in this case.

As one commentator has pointed out, there are often "improper" motives in filing for a Rule 11 sanction too, such as to intimidate the other side into withdrawing its claims, to dispose the judge against the other party, to get the judge to "split the difference" by denying sanctions but rejecting the opponent's position on the merits, and the like.[14] Allowing sanctions for such partial motives on behalf of attorneys for both plaintiffs and defendants would encourage the use of Rule 11 as a litigation tactic, defeat the purpose of the rule, and inhibit effective representation.

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[13] *National Ass'n of Govt. Employees*, 844 F.2d at 223 (sanctions based on harassment reversed where suit not totally lacking in merit and not brought solely to harass).

[14] M. Stein, *Rule 11 in the Real World: How the Dynamics of Litigation Defeat the Purposes of Imposing Attorney Fee Sanctions for the Assertion of Frivolous Legal Arguments*, 132 F.R.D. 309, 312-315 (1990). The same article points to several cases in which sanctions were imposed or threatened for positions later adopted by this Court. *Id.* at 318-320.

III. The values at stake in the case.

The confusion among the Circuits over the meaning of Rule 11(b) is reason enough for this Court to grant the writ. But in addition, important principles are involved here in addition to an attorney's right to speak freely and to zealously advance the rights of the attorney's clients.

The drafters of Rule 11 expressly sought to avoid creating conflicts between an attorney and his client. However, the interpretation of Rule 11 adopted by the court below creates just such a conflict. The writ of execution was meritorious and also resulted in Kmart talking to Minor, in part because of the publicity. If Minor had refrained from acting for fear of sanctions, his clients would not have been as zealously represented.

In addition, Rule 11 should not be construed so as to create "satellite litigation," which wastes the resources of both courts and parties, undermines professionalism, and inflicts litigation injury on third parties who have no stake in the controversy. The more circumstances covered by the "improper purpose" test, and the more difficult it is to tell what those circumstances are, the more parties and attorneys will be encouraged to launch Rule 11 battles with each other.

Then too, the facts the Fifth Circuit allowed to be used to establish improper purposes – notification of the press and statements at a press conference – mean that a lawyer can be exposed to sanctions under Rule 11 any time the lawyer acts in this fashion, even if the step in litigation that the lawyer is publicizing is meritorious. The lawyer's only choice under the circumstances is to stop speaking to the press. That in turn would cripple the ability of counsel to explain cases to

reporters who are not well grounded in the law.[15]

Finally, simply as a matter of Rule interpretation, neither "embarrassment" nor "seeking publicity" is a sound ground for imposing punishment under Rule 11. The Fifth Circuit scoffed at the assertion that almost every step in litigation intends to embarrass the opposing party, *i.e.*, prove that the other side is wrong, careless, negligent, or deceitful. The court, however, provided no reasonable explanation as to why this is not so.

Each of these matters lies at the heart of our federal litigation system and is vitally important not only to lawyers, but to financial institutions who collect judgments. They merit the attention of this Court.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
Telephone: (202) 637-5685
Of Counsel

LUTHER T. MUNFORD*
MICHAEL B. WALLACE
PHELPS DUNBAR L.L.P.
P. O. Box 23066
Jackson, MS 39225-3066
Telephone: (601) 352-2399

*Counsel of Record

Counsel for Petitioner

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[15] One is reminded that in virtually all news-worthy cases argued in this Court, advocates gather before microphones on the plaza after the argument and sum up both the facts and the law for the media.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-60153

BENNIE WHITEHEAD; ET AL.,
Plaintiffs,

v.

FOOD MAX OF MISSISSIPPI, INC.; ET AL.,
Defendants.

Appeal from the United States District Court
for the Southern District of Mississippi.

Before: KING, Chief Judge, and JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, DENNIS, and CLEMENT, Circuit Judges.[1]

RHESA HAWKINS BARKSDALE, Circuit Judge:

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[1] Judge Prado, who joined our court subsequent to *en banc* oral argument, did not participate in this decision.

Pursuant to Federal Rule of Civil Procedure 11, the district court sanctioned Paul S. Minor, an attorney, for obtaining a writ to execute judgment. The primary reason for our en banc review is to decide whether the district court abused its considerable discretion in imposing sanctions for Minor's violation of Rule 11(b)(1) ("improper purpose" in obtaining writ of execution). The district court acted within its discretion. AFFIRMED.

I.

In May 1997, the district court entered an approximate $3.4 million judgment for Minor's clients against Kmart Corporation in an action arising out of heinous acts by two individuals not associated with Kmart: their abduction of a mother and her daughter from a Kmart parking lot in Jackson, Mississippi, and the subsequent rape of the mother. A jury found Kmart negligent in failing to provide adequate parking lot security. *See Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265 (5th Cir. 1998).

At trial, Minor was sanctioned $1,000 for violating, during his closing argument, an earlier warning by the district court. *Id.* at 277 n.3. This followed Minor's refusals during trial to follow other court instructions. *See id.* at 276-77.

In June 1997, shortly after entry of judgment, Kmart moved for a remittitur or, alternatively, a new trial. *See* Fed. R. Civ. P. 59. In addition, pursuant to Federal Rule of Civil Procedure 62(b), it requested a stay of execution of judgment pending resolution of those post-trial motions. That stay motion was not decided, however, until 18 August, when the Rule 59 motions were denied. The accompanying stay motion was then dismissed as moot. That same day, the district court denied Minor's request to reconsider the $1,000 sanctions imposed at trial.

Three days later, using a handwritten request he had signed, Minor obtained from the district court clerk a writ of execution for the judgment (the writ). In addition, Minor notified the media about the pending execution. With media

representatives and two United States Marshals, Minor entered the Kmart (the abduction had occurred in its parking lot) and attempted to execute the judgment by seizing currency in the cash registers and vault. The seizure was delayed to allow Kmart's employees a chance to consult with their management and attorneys; shortly thereafter, it was stayed by the district court. No cash was seized.

While at the Kmart, Minor was interviewed by the media; news reports about the writ-execution, including Minor's extremely hyperbolic, intemperate, and misleading comments (improper comments), were, among other media, broadcast in at least three television reports. Minor characterized Kmart's actions as "arrogan[t]" and "outrageous" and asserted Kmart "wo[uld no]t pay" the judgment; claimed Kmart had been "warned" before the abduction that "an event like [that] was going to happen" but "didn't care"; charged his clients had been twice "victimized" by Kmart, once by being abducted there and once by Kmart's "not paying . . . a just debt"; and proclaimed he was there to ensure Kmart did what it was supposed to do.[2]

That same day, the district court held a teleconference with the parties: Kmart was directed to submit a supersedeas bond (it later did so); and Kmart advised it would seek sanctions against Minor. Kmart soon moved for sanctions, pursuant, *inter alia*, to Rule 11.

Kmart charged Minor had violated an automatic ten-day stay of execution of judgment, claimed to be in effect pursuant to Federal Rule of Civil Procedure 62(f), which incorporated Mississippi Rule of Civil Procedure 62(a). Federal Rule 62(f) provides:

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[2] It is extremely regrettable that, in the light of Minor's conduct, especially his improper comments, the dissent views "Minor's technique . . . [as] colorful to say the least", *Dissent* at 11-12, and "perhaps in poor taste", *id.* at 14.

> Stay According to State Law. In any state in which a *judgment is a lien* upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is *entitled*, in the district court held therein, *to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state.*

Fed R. Civ. P. 62(f) (emphasis added). Mississippi Rule 62(a) provides in part:

> Automatic Stay; Exceptions. Except as stated herein or as otherwise provided by statute or by order of the court for good cause shown, no execution shall be issued upon a judgment nor shall proceedings be taken for its enforcement *until the expiration of ten days after its entry or the disposition of a motion for a new trial, whichever last occurs.*

Miss. R. Civ. P. 62(a) (emphasis added).

Kmart maintained: pursuant to Mississippi Rule 62(a), a ten-day stay is automatic in state court after disposition of a new trial motion; therefore, application of that rule, through Federal Rule 62(f), resulted in a stay from the 18 August denial of Kmart's new trial motion. Kmart also asserted: Minor, with "numerous newspaper reporters and television interview teams", and without justification, "paraded through [Kmart] in full view of customers and employees ... orchestrat[ing] damage to Kmart, its business and goodwill"; and his "improper purpose" (proscribed by Rule 11(b)(1)) was obvious from these actions. Provided with the motion were copies of two articles from newspapers in Jackson and another city in Mississippi and a videotape of television broadcasts about the attempted execution. These items included Minor's improper comments.

Minor responded: following denial of the new trial motion, Kmart had not *moved*, pursuant to Federal Rule 62(f) for the Mississippi Rule 62(a) automatic stay; therefore, no stay had been in effect. (Nothing in the record indicates Minor

contended in district court that the judgment did not constitute a lien against Kmart's property (one of the prerequisites for a Federal Rule 62(f) stay).)

Minor also contended: seeking to obtain a portion of the judgment was not an improper purpose proscribed by Rule 11(b)(1); and, "where counsel's action has a reasonable basis under the law, a court will not find an improper purpose. . . ." Minor's affidavit stated he attempted execution in order to obtain a portion of the judgment because: (1) Kmart had not returned his telephone calls concerning potential settlement; and (2) he was concerned that Kmart, which he believed to be self-insured, had not posted a supersedeas bond.

The district court apparently delayed ruling on the sanctions motion pending Kmart's appeal from the judgment in the underlying action. For that appeal, our court held the jury had been influenced by passion and prejudice resulting from Minor's closing argument; the action was remanded in early 1999 for a new trial on damages. *See Whitehead*, 163 F.3d at 276-78, 281. That March, in the light of extensive briefing, oral argument (January 1998), and painstaking analysis of the authority construing Federal Rule 62(f), the district court ruled on the sanctions motion.

In a well-reasoned opinion, the court concluded: a motion is not a prerequisite to a stay under Federal Rule 62(f); and Kmart was protected by the stay against the attempted execution. *Whitehead v. Kmart Corp.*, 202 F. Supp. 2d 525, 529-32 (S.D. Miss. 1999). Concomitantly, the court concluded that Minor had "failed to make a reasonable inquiry into the law governing execution of judgments. . . ." *Id.* at 532. The court also ruled Minor "was seeking to embarrass [Kmart] and call attention to himself as a tireless laborer of the bar attempting to obtain justice for his client when, in fact, there was no basis whatsoever in fact or in law for the actions taken. . . ." *Id.* at 533.

Minor was ordered to pay Kmart approximately $8,000 - its attorney's fees for opposing the execution. *Id.* Although

Kmart had requested a public apology by Minor, the district court determined, and Kmart agreed, that publication of the sanctions opinion would suffice. *Id.* (The opinion was published in 2002, after rendition of the now-vacated panel opinion for this appeal.)

Following the remand-trial on damages, Minor appealed the Rule 11 sanctions. In January 2002, a divided panel reversed them. *Whitehead v. Food Max of Miss., Inc.*, 277 F.3d 791 (5th Cir.), vacated by 308 F.3d 472 (5th Cir. 2002) (en banc). (The panel majority included a district judge and Judge Henry A. Politz, who authored the opinion. Judge Politz died prior to our deciding to review this appeal *en banc*.)

Regarding Rule 11(b)(2) (objective reasonableness of inquiry concerning existing law), the panel majority held: as a matter of law, Federal Rule 62(f) does not afford the stay provided by state law unless the judgment debtor files a motion claiming the stay; accordingly, no stay was in effect; and the record did not support a conclusion that, before requesting the writ, Minor failed to make a reasonable inquiry into the governing law. *Id.* at 794-96.

Concerning Rule 11(b)(1) (improper purpose), the panel majority held: Minor's "intentional use of publicity for the *purpose of embarrassing an adversary" was "patently inappropriate*"; but, absent exceptional circumstances, an ulterior motive should not be read into a document filed for a legitimate purpose; and "any consequences that ... flow[ed] from such behavior" was a decision for the state bar. *Id.* at 796-97 (emphasis added).

The dissent urged that the district court did not abuse its discretion in concluding independent subparts (b)(1) and (2) were each violated. *Id.* at 797-802 (Barksdale, J., dissenting). Regarding subpart (b)(2), the dissent stated: it was not necessary to decide, as the majority had, whether a motion is required to trigger a Federal Rule 62(f) stay; at issue was whether Minor's actions were objectively

reasonable in the light of *then existing* legal authority; and, they were not. *Id.* at 800-802. As for subpart (b)(1), the dissent stated: Minor's "improper purpose" provided a separate basis for the sanctions; and they were appropriate in the light of Minor's media-actions, precisely the type of conduct Rule 11 is designed to remedy. *Id.* at 802.

Kmart petitioned for panel rehearing. In September 2002, our court decided *sua sponte* to review *en banc*, thereby vacating the panel opinion. 308 F.3d 472 (5th Cir. 2002) (en banc).

II.

Rule 11(b) provides in pertinent part:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, *formed after an inquiry reasonable under the circumstances*, –
>
> > (1) *it is not being presented for any improper purpose, such as to harass* or to cause unnecessary delay or needless increase in the cost of litigation; [and]
> >
> > (2) the claims, defenses, and other *legal contentions therein are warranted by* existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. . . .

Fed. R. Civ. P. 11(b) (emphasis added). Each obligation must be satisfied; violation of either justifies sanctions. *See, e.g., Walker v. City of Bogalusa*, 168 F.3d 237, 241 (5th Cir. 1999). And, in determining compliance *vel non* with each obligation, "the standard under which an attorney is measured is an objective, not subjective, standard of reasonableness under the circumstances". *Childs v. State*

Farm Mut. Auto. Ins. Co., 29 F.3d 1018, 1024 (5th Cir. 1994).

Rule 11 sanctions are reviewed only for an abuse of discretion, *e.g., Lulirama Ltd., Inc. v. Axcess Broad. Servs., Inc.*, 128 F.3d 872, 884 (5th Cir. 1997), including reviewing factual findings only for clear error, *e.g., Crove v. Smith,* 261 F.3d 558, 564 (5th Cir. 2001). This abuse of discretion standard is necessarily very deferential, for two reasons.

First, "based on its '[f]amiliar[ity] with the issues and litigants, the district court is better situated than the court of appeals to marshal the pertinent facts and *apply the fact-dependent legal standard mandated by Rule 11*'". *Lulirama, Ltd.*, 128 F.3d at 884 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990); emphasis added). *See also Mercury Air Group, Inc. v. Mansour*, 237 F.3d 542, 548 (5th Cir. 2001) ("the imposition of sanctions is often a *fact-intensive inquiry*, for which the *trial court is given wide discretion*" (emphasis added)).

Second, the district judge is independently responsible for maintaining the integrity of judicial proceedings in his court and, concomitantly, must be accorded the necessary authority. *See, e.g., Cooter & Gell*, 496 U.S. at 404; *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 894 F.2d 696, 702-03 (5th Cir. 1990) (discussing inherent power of court), *aff'd sub nom. Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).

It was for these reasons that our court, in *Thomas v. Capital Security Servs., Inc.*, 836 F. 2d 866, 872 (5th Cir. 1988) (en banc), established abuse of discretion, rather than in part *de novo*, as our standard of review for Rule 11 sanctions. This was confirmed by the Supreme Court in *Cooter & Gell*, partly with reasoning that rings true here:

> Rule 11's policy goals also support adopting an abuse-of-discretion standard. The district court is best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to

> serve Rule 11's goal of specific and general deterrence. *Deference to the determination of courts on the front lines of litigation will enhance these courts' ability to control the litigants before them. Such deference* will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court; it will also discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation.

496 U.S. at 404 (emphasis added).

For this deferential review, the "district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence". *Id.* at 405. "Generally, an abuse of discretion only occurs where *no reasonable person* could take the view adopted by the trial court." *Friends for Am. Free Enter. Ass'n v. Wal-Mart Stores, Inc.*, 284 F.3d 575, 578 (5th Cir. 2002) (internal quotation omitted; emphasis added)[3].

A.

Subparts (b)(1) and (2) of Rule 11 provide independent bases for sanctions. The district court concluded Minor violated each subpart; therefore, it is only necessary to decide whether he violated one.

1.

Regarding subpart (b)(2) (objective reasonableness of inquiry concerning existing law), Minor's affidavit in

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[3] The dissent does not even mention the deferential standard of review (important to our ruling); nor does it appear to review the sanctions under that deferential standard. In fact, it appears to forget that it was the district court, not this court, that decided Minor's conduct was violative of Rule 11 and, pursuant to its considerable discretion, imposed those sanctions.

opposition to sanctions stated he relied upon: (1) *Van Huss v. Landsberg,* 262 F. Supp. 867 (W.D. Mo. 1967) (*dictum*; Minor had cited this opinion earlier in opposing Kmart's motion for Federal Rule 62(b) stay pending resolution of its post-trial motions); (2) Wright, Miller & Kane, Federal Practice & Procedure § 2907 (1995) (motion for Federal Rule 62(f) stay *should, not must*, be filed); and (3) the district court's earlier denial (as moot) of Kmart's post-trial request for the Federal Rule 62(b) stay. The district court ruled that this authority, when juxtaposed against the plain language of the rules, did not support an objectively reasonable belief that no stay was in effect. *See Whitehead*, 202 F. Supp. 2d at 528-32.

Along this line, the panel majority focused on whether, as a matter of law, a motion is required to invoke the stay; it held that it was and that, as a result, no stay was in place to protect Kmart from execution. Instead, the panel should have addressed whether Minor's belief was objectively reasonable *at the time* he requested the writ. *See, e.g., Thomas*, 836 F.2d at 874 (proper focus is "snapshot" of instant when document signed). In any event, because subparts (b)(1) and (2) provide independent bases for sanctions, it is not necessary to decide whether the district court abused its discretion concerning subpart (b)(2). For purposes of deciding whether sanctions could be based on subpart (b)(1), we will assume Minor did not violate subpart (b)(2).

2.

After determining Minor failed to make a reasonable inquiry (violating subpart (b)(2)), *Whitehead*, 202 F. Supp. 2d at 529-32, and then addressing why Rule 11's "safe harbor" provision (subpart (c)(1)(A)) did not shelter Minor, *id.* at 532-33, the district court stated:

> *Additionally*, [Kmart] has submitted to this court several of the *articles and news reports* which were generated in the local press by the improper execution of judgment in the instant case. *It is clear from these unchallenged*

> *submissions that [Minor] was seeking to embarrass [Kmart] and call attention to himself as a tireless laborer of the bar* attempting to obtain justice for his client when, *in fact, there was no basis whatsoever in fact or in law for the actions taken on August 21, 1997.* Thus, this court is persuaded that the imposition of appropriate sanctions in this case is justified and proper.

Id. at 533 (emphasis added). As discussed *infra*, this subpart (b)(1) "improper purpose" ruling is sufficient to sustain the sanctions.

Minor insists we must decide the subpart (b)(2) issue, asserting that the subpart (b)(1) improper purpose ruling is inextricably intertwined with whether, under subpart (b)(2), he had an objectively reasonable belief that a stay did not exist. He claims: "[I]f there was authority that even arguably supported what [he] did, there was no basis for the sanctions motion". In support, Minor notes that the district court's improper purpose ruling states "there was no basis whatsoever in fact or in law for [Minor's] actions. . . ." *Id.* at 533.[4]

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[4] Likewise, the dissent insists that these bases are intertwined; insists on a rigid, several step evaluation-process; and erroneously claims we attribute "legitimate purpose" findings to the district court. This view appears to be based on a pre-1993 version of Rule 11. For example, the dissent relies upon case law that was decided under the previous version, under which these bases were not separated into specific, enumerated subparts. That case law correctly states the test under that previous rule: where a paper was "well grounded in fact and warranted by existing law", sanctions were imposed only under unusual circumstances. (Unlike the district court, the dissent ignores the well grounded *in fact* portion of the test (now subparts (b)(3) and (b)(4)) in contending that subparts (b)(1) and (b)(2) are intertwined.) We do not suggest that this case law is not instructive. In fact, for that reason, we cite some of the same case law. On the other hand, this case law does not support the dissent's view of subparts (b)(1) and

It is true that, generally, district courts do not sanction attorneys who make nonfrivolous representations. A district court may do so, however, where it is objectively ascertainable that an attorney submitted a paper to the court for an improper purpose. Fed. R. Civ. P. 11 (b)(1). *See, e.g., Sheets v. Yamaha Motors Corp.*, 891 F.2d 533, 537-38 (5th Cir. 1990); *Nat'l Ass'n of Gov't Employees, Inc. v. Nat'l Fed'n of Fed. Employees*, 844 F.2d 216, 224 (5th Cir. 1988).

Sheets, for instance, held filing excessive motions could constitute harassment proscribed by Rule 11, even if the motions were well-founded in law or fact. 891 F.2d at 538. Filing otherwise legitimate documents that use abusive language toward opposing counsel could also violate the rule, *Coats v. Pierre*, 890 F.2d 728, 734 (5th Cir.), *cert. denied*, 498 U.S. 821 (1990), as could filing a valid pleading or motion without a sincere intent to pursue it, *Cohen v. Virginia Elec. & Power Co.*, 788 F.2d 247 (4th Cir. 1986).

We conclude that the district court's "improper purpose" ruling was independent from its "inquiry concerning existing law" ruling. We base this upon the following factors: (1) the parties' having squarely placed the improper purpose issue before the district court; (2) its earlier citation to subpart (b)(1) in quoting all of Rule 11(b) in its order, *Whitehead*, 202 F. Supp. 2d at 526 n.l; (3) its subsequent specific enumeration of Rule 11 bases, including improper purpose, *id.* at 532 ("Minor presented to this court [a writ-execution request] certifying [(a)] that to the best of his knowledge, information, and belief, formed after a [reasonable] inquiry ...

(b)(2) as intertwined. The structure of the current rule (as amended in 1993) belies such a notion.

In any event, for purposes of deciding this appeal, it is not necessary to determine how Rule 11 in its present form might compel revising the test for improper purpose, as adopted for the former version of the Rule. The issue was not presented to our court. Moreover, the district court's improper purpose ruling, discussed *infra*, would easily pass muster under the test employed by the dissent.

that the [request] was proper; and [(b)] *that the letter requesting the writ of execution was not being presented for any improper purpose, such as to harass. . . .*"; emphasis added); (4) its then concluding Minor failed to make a subpart (b)(2) reasonable inquiry into the law, *id.* at 532; and (5) its then discussing Rule 11's "safe harbor" provision, *id.* at 532-33, before making its subpart (b)(1) improper purpose ruling, *id.* at 533. To conclude otherwise would render the improper purpose portion of the opinion superfluous. Moreover, the two subparts concern quite different considerations. And, again, the fact-driven improper purpose ruling can be sustained even if (as we assume for our analysis) there were a basis in law for Minor's obtaining the writ. The two bases were not intertwined.

3.

A district court may sanction an attorney for presenting a paper to the court for "*any* improper purpose, *such as to harass. . . .*" Fed. R. Civ. P. 11(b)(1) (emphasis added). Although a district court is not to read an ulterior motive into a document "well grounded in fact and law", it may do so in exceptional cases, such as this, where the improper purpose is objectively ascertainable. *See Sheets*, 891 F.2d at 537-38.

The district court *found* Minor had two improper purposes *for requesting the writ*: to embarrass Kmart; and to promote himself. *Whitehead*, 202 F. Supp. 2d at 533. Part of our abuse of discretion review is to determine whether the district court's ruling was "based ... on a clearly erroneous assessment of the evidence". *Cooter & Gell*, 496 U.S. at 405. Pursuant to the well-known standard of review for clear error *vel non*, we may disturb factual findings, which often involve credibility choices, only if a review of all the evidence leaves us with "the definite and firm conviction that a mistake has been made". *Tulia Feedlot, Inc. v. United States*, 513 F. 2d 800, 806 (5th Cir.), *cert. denied*, 423 U.S. 947 (1975).

In maintaining he had legitimate, not improper, purposes, Minor offered two reasons to the district court for obtaining the writ: obtaining part of the judgment for his clients; and trying to force settlement. The factual findings related to these two reasons were not clearly erroneous.

Obviously, there would not have been enough cash at one local Kmart to satisfy the $3.4 million judgment. In addition, the execution was unnecessary to secure the judgment; the judgment constituted a lien against Kmart's property in Mississippi. Again, nothing in the record indicates Minor disputed in district court that the judgment constituted such a lien. *See, e.g.*, Miss. Code Ann. § 11-7-191; *see also* Fed. R. Civ. P. 62(f). Minor notes that Kmart is *currently* in bankruptcy; this, of course, is irrelevant to Minor's purpose *at the time in question* (August 1997). In any event, even if Minor's purpose were only to obtain a portion of the judgment, the district court did not clearly err in finding Minor also had separate, improper purposes.

Assuming *arguendo* that attempting to force settlement is proper, but *see, e.g., Elster v. Alexander*, 122 F.R.D. 593, 604 (N.D. Ga. 1988) (attempt to coerce settlement *not* proper), Minor offered the following explanation to the district court: he had attempted to contact Kmart, but it had refused to return his telephone calls or speak to him about the case; therefore, he was forced to take this drastic measure to open lines of communication.

The record, however, contains only one letter from Minor requesting settlement discussions (3 June 1997, shortly before Kmart filed its post-trial motions). That letter does not reflect how many calls were made by Minor. In any event, his claim that Kmart refused all communication is belied by his letter: "I am sorry we have been missing each other *and I appreciate you returning my phone calls*". (Emphasis added.)

Minor's letter states he was attempting to ascertain whether Kmart wished to engage in settlement discussions before

posting an appeal bond. At the time of the letter, through mid-August, Kmart's post-trial motions (*e.g.* for a new trial) were pending. After the court ruled on the motions, Minor gave Kmart only three days before attempting to execute. There is no evidence that Minor attempted to contact Kmart during this three-day period. Accordingly, it was not clearly erroneous for the district court to reject Minor's claim that he was forced to obtain the writ in order to initiate settlement discussion.

In addition, it was not clearly erroneous for the district court, by implication, to find that neither of these claimed purposes explained either Minor's presence at the execution or his collateral media play. The execution did not require Minor to accompany the two United States Marshals to the Kmart (especially where, as here, the involved property was well-known, open, and obvious). *See* Fed. R. Civ. P. 69. *See* also MOORS' S FEDERAL PRACTICE - CIVIL § 69.02 (2002). And, the execution certainly did not require the media's presence at the Kmart or the improper comments Minor made there to the media.

In fact, Minor *does not dispute* that he *intended* to embarrass Kmart or that he was seeking personal recognition. Most regrettably, he contends that these are far from being evidence of an improper purpose in obtaining the writ (*e.g.*, "[a]lmost everything an attorney in litigation does ... is designed to embarrass an opponent in one way or another"; "establishing a reputation for success in the representation of clients is the most professional way for a lawyer to build a practice"). It was not clearly erroneous for the district court to find that each of Minor's intended goals was evidence of an improper purpose.

Claiming a *purpose to embarrass* is different than *one to harass*, Minor seems to contend that, because Rule 11 explicitly refers to harassment, and because that was not his purpose, his *admitted intent to embarrass* cannot be an improper purpose under the rule. On this record, there is no meaningful distinction between these two purposes,

especially in the light of our deferential standard of review. *See, e.g., Flaherty v. Torquato*, 623 F. Supp. 55, 59-60 (W.D. Pa. 1985) (using harass and embarrass interchangeably in context of Rule 11 improper purpose discussion), *aff'd by* 800 F.2d 1133 (3rd Cir. 1986). Regardless, Minor misreads Rule 11.

Even assuming that Minor's purpose to embarrass Kmart was not, in essence, a purpose to harass, Rule 11's list of improper purposes is only illustrative; "to harass" is but one of the possible improper purposes. Fed. R. Civ. P. 11(b)(1) ("any improper purpose, such as to harass..." (emphasis added)).

The media event orchestrated by Minor, in particular, constitutes objective evidence of his improper purpose in obtaining the writ. *See, e.g., Ivy v. Kimborough*, 115 F.3d 550, 553 (8th Cir. 1997) (no abuse of discretion in imposing Rule 11 sanctions, where, *inter alia*, conduct was "aimed at the media" and "primarily for local media consumption") ; *Kramer v. Tribe*, 156 F.R.D. 96 (D.N.J. 1994), *aff'd* without opinion, 52 F.3d 315 (3rd Cir.), *cert. denied*, 516 U.S. 907 (1995) (imposing Rule 11 sanctions because, among other things, giving misleading reports to media demonstrated improper purpose motives (including intent to embarrass)). Again, the district court had an unchallenged videotape of, *inter alia*, Minor's improper comments. The district court's finding "[i]t . . . *clear* from [the] unchallenged" newspaper articles and videotape that Minor had an improper purpose, *Whitehead*, 202 F. Supp. 2d at 533 (emphasis added), is a classic example of Minor's being "[h]oist with his own petard". William Shakespeare, Hamlet act 3, sc. 4. Minor's improper comments, preserved by the very entity he enlisted to embarrass Kmart and promote himself were, instead, arguably the best evidence of his improper purpose in obtaining the writ.

Before our *en banc* court, Minor raises, for the first time, First Amendment considerations with regard to his improper comments. No authority need be cited for the rule that,

because the record does not reflect that Minor raised these points in district court, we will not consider them on appeal. In any event, the improper purpose in obtaining the writ, not the vehicle (such as the media) used to implement that improper purpose, is what is decided by the sanctioning court and reviewed on appeal. In other words, under subpart (b)(1), Minor's attempted execution is not the issue; his underlying "improper purpose" in obtaining the writ is. The collateral media play simply constitutes objective evidence of that improper purpose.

Finally, Minor asserts that, although his conduct may not have been "civil", it is not sanctionable. He maintains: civility is "aspirational" and beyond the power of the law; and if our court wants to impose civility rules, we should adopt them. Along this line, Minor takes issue with any suggestion in the vacated panel opinion that his conduct was unethical. *See Whitehead*, 277 F.3d at 796-97. He further contends: even if his conduct were unethical, the appropriate remedy would be referral to the state bar for possible discipline, not imposition of Rule 11 sanctions. This issue is also raised for the first time on appeal. Because the vacated panel opinion addressed the issue in part, *see id.*, we will consider it.

Minor again understates the severity of his conduct and overlooks both the district court's broad authority to impose Rule 11 sanctions and our deferential standard of review. Whether Minor's conduct violated civility and ethics rules is for others to act upon; in any event, his conduct violated Rule 11.

These categories are not mutually exclusive. For example, the rules advisory committee has recognized that some overlap exists between state bar discipline and Rule 11 sanctions; its notes to Rule 11 state that one possible sanction for a violation of Rule 11 is referral to a state bar authority. *See also Kramer*, 156 F.R.D. 96 (imposing sanctions *and* referring matter to state bar). District courts have an independent duty to maintain the integrity of the judicial

process and may impose Rule 11 sanctions where necessary, regardless of whether state bar discipline is concurrent.

Rule 11 limits sanctions "to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated". Fed. R. Civ. P. 11(c)(2). In addition to publishing its sanctions opinion, the district court limited the sanctions to "the reasonable attorneys' fees and other expenses incurred as a direct result of the violation", *id.* Minor does not challenge this aspect of the order.

4.

In sum, there was no abuse of discretion. The district court spoke with counsel, including Minor, on the day of the incident and was quite familiar with the parties and litigants. Minor's execution attempt followed his improper conduct at trial. *See Whitehead*, 163 F.3d at 276-77 n.3; *see also* Fed. R. Civ. P. 11 advisory committee's note ("whether [sanctionable conduct] was part of a pattern of activity, or an isolated event" is "[a] proper consideration").

Generally, writ-execution for the purpose of satisfying a judgment is proper. Minor's conduct, however, was exceptional. Although it was only *three days* after disposition of post-trial motions, with significant time remaining for Kmart to appeal the judgment and post a supersedeas bond, Minor, after obtaining the execution writ: invited the media to one of Kmart's places of business to execute judgment in plain view of Kmart's customers and employees; and made improper comments to the media regarding the case, Kmart, and Kmart's willingness to satisfy the judgment.

The district court found, based in part on the videotape, that Minor had improper purposes in obtaining the writ: to embarrass Kmart and advance his personal position. The district court, of course, is in a far better position than we to balance the considerations underlying rulings on Rule 11 sanctions, most especially the concomitant factual findings (including credibility choices). Obviously, this is why we

review its decision under a very deferential abuse of discretion standard. For the subpart (b)(1) improper purpose ruling: the record does not support these findings being clearly erroneous; nor was there "an erroneous view of the law". *See Cooter & Gell*, 496 U.S. at 405.

B.

Minor moves for summary reversal and imposition of sanctions against Kmart, or for remand for fact-finding and such sanctions, contending: Kmart caused the attempted execution by earlier, false responses during discovery that it was self-insured; and, had Minor known of insurance covering the judgment, he would not have attempted to execute. (It appears Kmart was partly self-insured, with umbrella coverage.)

The relief sought by Minor's motion was requested, for the first time, while this appeal was pending. In his motion, Minor stated this claim was neither known, nor confirmed, until well after his appeal was filed. The panel majority did not address the motion, in the light of its reversing the sanctions. *Whitehead*, 277 F.3d at 791.

Minor fails to connect how his understanding of Kmart's self-insured status justified his improper-purpose conduct. Kmart's discovery responses do not affect the considerations underlying whether Minor's purpose in obtaining the writ was proper. (We express no opinion on whether Minor can seek relief in district court based on the challenged discovery responses.)

III.

For the foregoing reasons, the sanctions are AFFIRMED; Minor's motion for summary reversal or remand is DENIED.

SANCTIONS AFFIRMED; MOTION DENIED

KING, Chief Judge, with whom SMITH and BENAVIDES, Circuit Judges, join, dissenting:

The majority, appellate judges all, are plainly exercised about lawyer Paul Minor's efforts to collect his clients' judgment against Kmart. In their effort to declare the kind of behavior that will not be accepted by this court, they have short-circuited the inquiry mandated by Rule 11 and our own case law, with potentially far-reaching consequences. I respectfully dissent.

In evaluating a district court's imposition of sanctions under Rule 11(b)(1), this and other circuits generally look first to the district court's findings on whether the filing at issue was warranted by existing law or a nonfrivolous argument for a change in the law (as required by Rule 11 (b)(2)); look next to the findings on whether the filing was presented for an improper purpose under Rule 11(b)(1); look next to the findings on whether the filing was also presented for a legitimate purpose; and finally look to the district court's evaluation of whether any improper purpose is sufficient under the circumstances to support sanctions under Rule 11(b)(1). If the district court has correctly found a legitimate purpose for the filing, this and other circuits have been reluctant to approve the imposition of sanctions for an improper purpose under Rule 11(b)(1). Here, by contrast, the majority presents the two relevant subparts of Rule 11 as *not* intertwined for purposes of assessing Rule 11(b)(1) sanctions. The majority then goes on to credit the district court with making crucial findings on both legitimate and improper purposes that the district court plainly did not make. The majority winds up by affirming the district court's conclusion that sanctions are warranted under Rule 11(b)(1) where it is not at all clear that the district court concluded as much. This entire method of evaluating sanctions assessed under Rule 11 effectively eviscerates what were, up until this point, critical aspects of the Rule 11 framework.

I. ANALYSIS OF THE FRAMEWORK FOR SANCTIONS UNDER RULE 11(b)(1)

A. The Interrelation of Rule 11(b)(1) and 11(b)(2)

Rule 11(b)(2) explicitly requires that an attorney submit a paper to the court only after forming a reasonable belief that it is warranted by existing law (or a non-frivolous argument for a change in the law) and Rule 11(b)(1) explicitly precludes an attorney from submitting a paper for certain "improper purposes."[5]

The subsections thus appear to be quite discrete textually. However, our case law demonstrates that the subsections are actually interrelated in at least one situation: "When a [paper] is well grounded in fact and warranted by existing law, `only under *unusual circumstances* . . . should the filing of [the paper] constitute sanctionable conduct." *F.D.I.C. v. Calhoun*, 34 F.3d 1291, 1300 (5th Cir. 1994) (emphasis added) (quoting *Sheets v. Yamaha Motors Corp., U.S.A.*, 891

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5 The two relevant subparts of Rule 11 state that:

> (b) By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

Fed. R. Civ. P. 11 (b)(1)-(2).

F.2d 533, 538 (5th Cir. 1990)). This circuit has extended this logic in concluding that "[a]lthough the filing of a paper for an improper purpose is not immunized from rule 11 sanctions simply because it is well grounded in fact and law, *only under unusual circumstances* - such as the filing of excessive motions - should the filing [] constitute sanctionable conduct." *Sheets*, 891 F.2d at 538 (emphasis added).

What this precedent says is that (1) a favorable finding regarding Rule 11(b)(2) should influence a district court's conclusion regarding the existence of an "improper purpose" sanction under Rule 11(b)(1), and (2) only in the most exceptional circumstances will this court uphold sanctions under Rule 11(b)(1) when a paper satisfies the Rule 11(b)(2) requirements.

Here, the majority first concludes, correctly, that "the two subparts [Rule 11(b)(1) and Rule 11(b)(2)] concern quite different considerations" but then concludes, incorrectly, that they need "not" be "intertwined" in the Rule 11(b)(1) inquiry. Our precedent does not support that. In the interest of bypassing an evaluation of the district court's possibly incorrect finding under Rule 11(b)(2), the majority has announced a rule (that the Rule 11(b)(1) and 11(b)(2) inquiries need not be intertwined in a situation where Rule 11(b)(1) sanctions are to be imposed) that is directly at odds with our precedent. In my view, that is a serious mistake, now bad law.[6]

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[6] In footnote 4, the majority states that: "In any event, for purposes of deciding this appeal, it is not necessary to determine how Rule 11 in its present form might compel revising the test for improper purpose, as adopted for the former version of the Rule." This statement underscores a critical shortcoming with the majority's opinion. It announces a new rule (that the Rule 11(b)(1) and 11(b)(2) inquiries are unrelated in a fact pattern where Rule 11(b)(1) sanctions are to be imposed, even if the paper at issue was submitted in compliance with Rule 11(b)(2)), but says it does not,

B. The Necessary Predicate to Impose Sanctions under Rule 11 (b)(1)

Our case law makes clear that the next step in the framework for imposing "improper purpose" sanctions is the consideration by the district court of legitimate and improper purposes the litigant or party may have had for submitting the relevant paper. In its quest to uphold the district court's imposition of sanctions, the majority attributes findings to the district court regarding this legitimate purpose step that the district court clearly did not make, and attributes a legal conclusion to the district court regarding whether sanctions are warranted independently under Rule 11(b)(1) that the district court may not have even made.

Assuming the district court finds a legitimate purpose or purposes for the relevant filing, then it must weigh the legitimate purposes against any illegitimate purposes and evaluate whether the illegitimate purposes are sufficient in themselves to independently support sanctions under Rule 11(b)(1). As we stated in *National Association of Government Employees, Inc. v. National Federation of Federal Employees*, 844 F.2d 216 (5th Cir. 1988):

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and then announces that, in any event, knowledge of the applicable Rule 11(b)(1) framework is not necessary for sanctions to be imposed here.

In contrast, I see the framework as critical. The facts related to the "improper" nature of Minor's presenting the writ to the district court must be funneled through the correct framework *before* the imposition of sanctions can be deemed appropriate. As taught by our case law (which has not been questioned until today and which is plainly cited by the majority for the exact proposition for which the dissent cites the same case law), if the relevant filing satisfies Rule 11(b)(2) requirements and is found to have been presented for a legitimate purpose, we are extremely reluctant to approve the imposition of sanctions for an improper purpose under Rule 11(b)(1). If the majority seeks to alter this clear rule, it should say so (and maybe it has, who's to say?) and then apply its new rule to the facts of this case.

> We do not condone litigation instituted for ulterior purposes rather than to secure judgment on a well-grounded complaint in which the plaintiff sincerely believes. *Yet the Rule 11 injunction against harassment does not exact of those who file pleadings an undiluted desire for just deserts* . . . [T]he court must focus on objectively ascertainable circumstances that support an inference that a filing harassed the defendant or caused unnecessary delay. As Judge Schwarzer has stated: "If a reasonably clear legal justification can be shown for the filing of the paper in question, no improper purpose can be found and sanctions are inappropriate" . . . A plaintiff must file a complaint [] in order to vindicate his rights in court. We find no indication that the filing here was unnecessary, for the [defendants] had refused to retract the [alleged defamatory] statement. Under the circumstances, the [plaintiff] had a proper interest in suing to attempt to vindicate its reputation.

Id. at 223-24 (internal footnote omitted and emphasis added). Thus, as interpreted by our court, before a district court can impose sanctions under Rule 11(b)(1), it must consider any legitimate or proper purposes the litigant or attorney may have had in presenting a paper to the district court. Before today, we were loath to find that an attorney's or litigant's illegitimate purpose could independently support sanctions where a legitimate purpose for filing the relevant paper also existed.

Here, paying lip service to the required inquiry into legitimate purposes, the majority upholds as "not clearly erroneous" factual findings rejecting Minor's proffered legitimate purposes for seeking the writ of execution (to satisfy part of the judgment for his client in order to pay medical bills and to encourage settlement). However, though I have thoroughly searched the district court's order, I find no mention, much less discussion, of any possible legitimate or proper purpose. This necessary predicate is simply not there.

The Fourth Circuit case of *In re Kunstler*, 914 F.2d 505 (4th Cir. 1990), discusses the importance of the critical step omitted by the district court:

> Rule 11 defines the term "improper purpose" to include factors "such as to harass or to cause unnecessary delay or needless increase in the costs of litigation." The factors mentioned in the rule are not exclusive. If a complaint is not filed to vindicate rights in court, its purpose must be improper. *However, if a complaint is filed to vindicate rights in court, and also for some other purpose, a court should not sanction counsel for an intention that the court does not approve, so long as the added purpose is not undertaken in bad faith and is not so excessive as to eliminate a proper purpose.* Thus, the purpose to vindicate rights in court must be central and sincere . . . In other words, it is not enough that the injured party subjectively believes that a lawsuit was brought to harass, or to focus negative publicity on the injured party.

Id. at 518 (emphasis added). *Kunstler's* holding accords with our circuit precedent. If an illegitimate purpose does not engulf an individual's legitimate purpose, sanctions under the "improper purpose" section of Rule 11 cannot stand. Because the district court overlooked this important inquiry, our court has no place upholding findings that are not even there.

In addition to attributing factual findings to the district court that it did not make, the majority jumps to the support of a legal conclusion that the district court may not have even made. The majority points to a single paragraph in the district court's eighteen-page order that references Minor's desire to embarrass Kmart and to gain publicity for himself as indisputably demonstrating an intention on the part of the district court to sanction Minor independently under Rule 11(b)(1). However, it is not clear, much less "indisputable," from this single paragraph that the district court intended to sanction Minor under Rule 11(b)(1) as independent from

Rule 11(b)(2), especially as this paragraph expressly states that "*there was no basis whatsoever in fact or in law* for the actions taken on August 21, 1997." Whether there is a basis in law is clearly the relevant inquiry under Rule 11(b)(2), not Rule 11(b)(1). Further, the district court does not use any of the descriptive language found in Rule 11(b)(1)'s non-exclusive list, such as "harass." While this is not required, I would expect to see some discussion regarding a comparison between "harass" and "embarrass" if the district court truly intended (as the majority assumes) to use the terms interchangeably and to sanction Minor independently under Rule 11(b)(1).[7] At a minimum, I would expect the district court to have at least mentioned either the subpart dealing with "improper purpose" or the term "improper purpose" itself in this paragraph, particularly given the extent of the discussion regarding Rule 11(b)(2).

In the past, when an order imposing sanctions contained such shortcomings, we refused to supply the necessary findings and conclusions on appeal because we, as appellate judges, must not become fact finders. *See, e.g., F.D.I.C. v.*

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[7] Further, the majority goes so far as to state, without discussion, that "[o]n this record, there is no meaningful distinction between these two purposes ["harass" and "embarrass"], especially in the light of our deferential standard of review." In support of this statement, it cites to *Flaherty v. Torquato*, 623 F. Supp. 55, 59-60 (W.D. Pa. 1985), *aff'd without op.*, 800 F.2d 1133 (3d Cir. 1986), as "using harass and embarrass interchangeably in context of Rule 11 improper purpose discussion." However, a cursory read of this non-binding district court opinion reveals that the court does not use these terms interchangeably in its decision to *decline* to award sanctions. *Id.* Moreover, we have on occasion discussed "harass" in the context of Rule 11(b)(1) to cover conduct such as the "filing of excessive motions." *Nat'l Assoc. of Gov't Empl.*, 844 F.2d at 224. This connotation comports with the general usage and understanding of "harass" - annoyance or exhaustion with the added characteristic of persistency or repetitiveness - as opposed to "embarrass" - mere distress or self-consciousness. *See Webster's New Collegiate Dictionary* 370, 522 (1977).

Calhoun, 34 F.3d 1291, 1297 (5th Cir. 1994) ("We have long held that a district court, in applying sanctions, may have to make a detailed explanation for its legal reasons. . . . The purpose of creating such a record is simple: In order to guard against the application of hindsight by district courts who have sat through long, complicated, and often contentious proceedings, we must not be put in the position of having to guess what unwarranted factual or legal errors were the basis of the sanctions."); *United States v. U.T. Alexander*, 981 F.2d 250, 253 (5th Cir. 1993) ("The district court here did not cite any `unusual circumstances' that warranted sanctions. The court merely asserted the view that the claim was filed for an improper purpose. Even though detailed findings are not required to uphold an award of sanctions, there must be some record to review."). Today the majority back-pedals from this precedent to supply - and, indeed, even credit the district court with - the necessary factual predicate omitted by the district court and to supply a legal conclusion that may not have been made by the district court. I cannot subscribe to this technique.

II. THE "UNUSUAL" OR "EXCEPTIONAL" CIRCUMSTANCES REQUIREMENT

Our precedent is clear. Even assuming the district court had made appropriate factual findings on whether Minor had a legitimate purpose for obtaining the writ of execution here, in situations where an attorney or party submits a paper that is well-grounded in law under Rule 11(b)(2) - as the majority assumes arguendo to be the case here - "improper purpose" sanctions may be imposed by a district court only in "unusual" or "exceptional" circumstances. I disagree with the majority's implied finding that this case presents such "unusual" circumstances.

To date, we have not found a case with such "unusual circumstances" to merit upholding an "improper purpose" finding where (as is assumed to be the case here) the filing of the paper satisfies the Rule 11(b)(2) requirements. *See, e.g., Calhoun*, 34 F. 3d at 1300; *Sheets*, 891 F.2d at 538; *Nat' l*

Assoc. of Gov' t Empl., 844 F.2d at 224.[8] In this spirit, I disagree with the majority that this case should serve as the benchmark for district courts imposing "improper purpose" sanctions in the future. With only a finding by the district court of an intent to embarrass one's opponent and an intent to gain publicity for oneself - both quite common characteristics in a judgment or debt collection setting - the case will serve as a poor litmus, particularly given that the district court did not even consider whether Minor had a legitimate purpose for the filing. As things appear to me, the majority employs an "I know it when I see it" approach to judging Minor's technique, substituting its own findings where the district court made none.

The majority shames Minor for conduct it determines does not befit an upstanding officer of the court. Specifically, it appears most perturbed regarding Minor's offensive tow of the media to the judgment collection. I admit that Minor's technique here is colorful to say the least. However, other courts have looked at similar circumstances and have not been so critical of the litigants' choice of litigation tactics.

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[8] *Coats v. Pierre*, 890 F.2d 728 (5th Cir. 1989), is the closest we have come to such a finding. There, a teacher who was denied tenure and not rehired brought a civil rights action alleging wrongful termination in retaliation for exercising free speech. *Id.* at 731. We upheld Rule 11 sanctions for the plaintiff's *harassing* filings, which stated that opposing counsel "acted like a little nasty dumb female Mexican pig in heat" and that she was "nothing but garbage." *Id.* at 734. Although the district court failed there to make a specific finding that the suit was groundless, it concluded that sanctions were warranted because the plaintiff's allegations were "totally unsupported by any of the people [he] called from the university" and his filing was "worse than outrageous," was "unconscionable" and was worthy of "contempt" proceedings. *Id.* The case before us is clearly distinguishable from *Coats*. The district court in *Coats* found the lawsuit unsupportable in law whereas here, the majority assumes the opposite - that is, it assumes that it was objectively reasonable under existing fact and law for Minor to file the writ of execution with the district court.

See, e.g., Revson v. Cinque & Cinque, P.C., 221 F.3d 71, 80 (2d Cir. 2000) (stating that airing grievances and threatening litigation through letters "are commonplace" and that "[s]imilarly, the court's concern that [plaintiff] had in fact tarnished [defendant's] reputation speaking with a news reporter was not a proper basis for sanctions under Rule 11); *Sussman v. Bank of Israel*, 56 F.3d 450, 2d Cir. 1995) ("The district court held that the filing of the complaint with a view to exerting pressure on defendants through the generation of adverse economically disadvantageous publicity reflected an improper purpose. To the extent that a complaint is not held to lack foundation in law or fact, we disagree. It is not the role of Rule 11 to safegard a defendant from public criticism that may result from the assertion of frivolous claims.") *In re Kunstler*, 914 F. 2d 505, 520 (4th Cir. 1990) ("Holding a press conference to announce a lawsuit, while perhaps in poor taste, is not grounds for a Rule 11 sanction, nor is a subjective hope by a plaintiff that a lawsuit will embarrass or upset a defendant, so long as there is evidence that a plaintiff's central purpose in filing a complaint was to vindicate rights through the judicial process."). Further, in each of the cases cited by the majority in support of its determination that "improper purpose" sanctions are warranted here, the district court had specifically found that the relevant filing was *not* well-grounded in law under Rule 11(b)(2). *See Ivy v. Kimbrough*, 115 F.3d 550, 553 (8th Cir. 1997) (sanctioning the plaintiff and his attorney for bringing a frivolous action against a police officer and judge involved in his arrest subsequent to a marital dispute because "the court, with good cause, gave [the plaintiff and his attorney] repeated warning that their claims appeared to be frivolous, that much of their conduct seemed aimed at the media, and that failure to properly pursue this lawsuit risked dismissal and possible sanctions"); *Kramer v. Tribe*, 156 F.R.D. 96 (D.N.J. 1994) (sanctioning an attorney under Rule 11(b)(1) and (b)(2), § 1927 and its inherent authority through fines, submission of counsel to attorney disciplinary authorities and submission of counsel to criminal authorities where the attorney had no legitimate purpose for filing the suit and had

a history (at least 36 instances) of unethical conduct before the courts), *aff'd without op.*, 52 F.3d 315 (3d Cir. 1995); *Elster v. Alexander*, 122 F.R.D. 593, 604 (N.D. Ga. 1988) (imposing Rule 11 sanctions where "pleadings and papers filed on behalf of plaintiff . . . were filed without that reasonable inquiry which Rule 11 requires"). These cases thus provide little support for the majority because, in contrast to these cases, the majority here presumes (in the face of what may well be problematic findings to the contrary by the district court) that the writ filed by Minor *was* well-grounded in law as required by Rule 11(b)(2).

I agree with the original panel's determination that Minor's conduct, while perhaps in poor taste, does not merit sanctions under Rule 11(b)(1). We, as appellate judges, operate at a far remove from the business of collecting judgments or effecting settlements. We ought to refrain from excoriating a lawyer based upon our own sensibilities when the district court, closer to that business than we are, has not provided a clear and explicit predicate for the exercise of our judgment.

III. WHAT WE SHOULD HAVE DONE

I think that we should take the district court at its word and review the judgment that it *did* enter - sanctions based on a violation of Rule 11(b)(2). I think that the district court's conclusions on that violation are probably wrong, although I agree with Judge Barksdale's original dissent insofar as it stated that neither the district court nor the panel was required to decide whether a motion is necessary to trigger the Mississippi Rule 62 (a) automatic stay. As Judge Barksdale said, the inquiry is, instead, whether Minor undertook a reasonable inquiry into the authority regarding Fed. R. Civ. P. 62 (f) and, if he did, whether his actions were objectively reasonable. My own conclusion is that Minor did make a reasonable inquiry into the authority (scarce as it is to this good day) ; I am less certain about whether his action in executing the judgment without prior court authorization was objectively reasonable, given the paucity of authority on the subject. But under the circumstances, I would not uphold

sanctions against Minor for what amounts at most to a mistake of judgment on that score. I would vacate the sanctions order.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-60153

BENNIE WHITEHEAD; ET AL.,
Plaintiffs,

v.

FOOD MAX OF MISSISSIPPI, INC.; ET AL.,
Defendants.

KMART CORPORATION,
Defendant-Appellee.

v.

PAUL S. MINOR
Appellant.

Appeal from the United States District Court
for the District of Mississippi

Decided: January 11, 2002

Before POLITZ and BARKSDALE, Circuit Judges, and FALLON,[1] District Judge.

POLITZ, Circuit Judge:

Paul S. Minor appeals an order imposing sanctions for his execution of a judgment at a Kmart retail store. Concluding that the trial court erred in its interpretation and application of Rule 62(f) of the Federal Rules of Civil Procedure, we reverse.

BACKGROUND

A woman and her daughter were abducted from Kmart's parking lot. The offenders raped the victim while holding her child at knife-point. In a jury trial plaintiffs successfully sued Kmart. Their counsel was the appellant, Paul Minor. Kmart moved for a new trial, a remittitur, and a stay under Fed. R. Civ. P. 62(b) pending disposition of its motions. The district court denied these motions and three days later Minor obtained a Writ of Execution and Fieri Facias from the Clerk of Court. Accompanied by newspaper and television reporters Minor went to the local Kmart establishment with two federal marshals and sought execution on the writ by seizing money assets in the store's registers and safe. The district court, informed of Minor's steps to execute the judgment, instructed the Marshals' office to cease and desist pending a telephone conference that afternoon. At the conference, the court directed Kmart to submit a bond so that

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[1] District Judge, Eastern District of Louisiana, sitting by designation.

all matters would be stayed pending appeal. Kmart agreed, and also filed its Notice of Appeal, Motion for Stay of Execution of Judgment Pending Appeal, and Amended Motion for Approval of Supersedeas Bond.

Thereafter, Kmart moved for sanctions under Rule 11(b), 11(c)(1)(B), and 28 U.S.C. § 1927, supporting its motion by citing Rule 62(f) of the Federal Rules of Civil Procedure which provides that a judgment debtor is entitled to a stay as would be accorded the debtor had the action been maintained in state court. Kmart claimed that Rule 62(a) of the Mississippi Rules of Civil Procedure provides for an automatic ten-day stay following the denial of a motion for a new trial. It claimed that Minor's actions in executing the judgment that Rule. While Kmart's motion for sanctions was pending, we affirmed as to the liability of Kmart but remanded for a new trial on damages.

The district court thereafter granted Kmart's motion for sanctions, finding that Minor "was seeking to embarrass [Kmart] ... when, in fact, there was no basis whatsoever in fact or in law for the actions taken on August 21, 1997." The court found no basis for Minor's actions because it concluded that Kmart enjoyed an automatic stay under federal Rule 62(f) and Mississippi Rule 62(a). The trial court relied on the language of Rule 62(f) which says that a judgment debtor is entitled to such stay as would be accorded in state court, and noted that Mississippi Rule 62(a) would have given Kmart an automatic stay until ten days after the court ruled on its motion for a new trial. The trial court determined that Minor "failed to make a reasonable inquiry into the law governing execution of judgments." Minor appeals this order granting sanctions.

ANALYSIS

We review a district court's decision to invoke Rule 11 under an abuse of discretion standard,[2] giving great deference to an order imposing sanctions because "the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11."[3] Even under this deferential standard, however, a court abuses its discretion when its "ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence."[4] We conclude that the trial court erred in its interpretation of Rule 62(f) and that Minor's conduct complied with the mandates of Rule 11.

I. Federal Rule 62(f) and Mississippi Rule 62(a)

The district court based its ruling on the specific language of federal Rule 62(f) and the automatic stay authorized by Mississippi Rule 62(a). Rule 62(f) of the Federal Rules of Civil Procedure provides in pertinent part that:

> [i]n any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court therein, to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state.

The court noted in a footnote that this rule applied herein because Kmart was a judgment debtor against whose property the judgment operated as a lien and it was entitled to a stay of execution under Rule 62(a) of the Mississippi Rules of Civil Procedure. That rule provides as follows:

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2 *Childs v. State Farm Mut. Automobile Ins. Co.*, 29 F.3d 1018 (5th Cir. 1994).

3 *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990).

4 *Matta v. May*, 118 F.3d 410, 413 (5th Cir.1997).

(a) Automatic Stay: Exceptions

Except as stated herein or as otherwise provided by statute or by order of the court for good cause shown, no execution shall be issued upon a judgment nor shall proceedings be taken for its enforcement until the expiration of ten days after the later of its entry or the disposition of a motion for a new trial....

The court determined that although Kmart did not move for a stay under either of these rules, it nonetheless enjoyed a ten-day stay under Rule 62(a) because such a stay applies automatically after the disposition of a motion for a new trial and federal Rule 62(f) states that a judgment debtor is "entitled" to any stay applicable in state court. A close reading of the rule, practical and policy considerations, and a review of the legal authority addressing this issue persuades us beyond peradventure that the trial court erred in its application of federal Rule 62(f).

A. Plain Meaning of Rule 62(f)

Although Rule 62(f) provides that a judgment debtor is "entitled" to such stay as it would receive if the action were brought in state court, we must disagree with the district court that by this choice of language Congress sought to afford the protection of state staying provisions without requiring parties to file an appropriate motion with the court. The word "entitled" includes "to grant a legal right to or qualify for."[5] Accordingly, Rule 62(f) bestows upon the federal litigant grounds for securing or claiming an applicable state law stay in the district court. We must conclude, however, that the Rule does not afford the protection of a stay applicable under state law, even if automatic in state court, unless the litigant asserts the rights by filing a proper motion.[6]

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5 Black's Law Dictionary 553 (7th ed. 1999).

6 We note that the use of "entitled" in other federal rules supports this definition. For example, the rules require

B. Policy Considerations

Sound policy protocols militate against enforcing state staying provisions in federal court without requiring the benefiting party to request such relief. Permitting a party to rely on a state procedural rule without affirmatively seeking its protection places federal trial judges in a precarious position. In addition to the obvious necessity of possessing a detailed knowledge of the federal rules, such an interpretation would require federal judges to master the intricate procedural rules and practice of the various states. The problems associated with this approach increase exponentially in diversity cases with complex choice-of-law issues. Cases invoking diversity jurisdiction could require an in-depth grasp of not only the law of the state in which a federal judge sits, but the law of any given state. After resolving the choice-of-law issues, the judge would have to scrutinize the law of the subject state to ensure that none of the court's orders violated an automatic stay provision instantly applicable through Rule 62(f), notwithstanding the fact that the benefiting party filed no motion identifying the relevant state rule, practice, or procedure. We deem it unwise and inappropriate and therefore decline to impose such a heavy and unnecessary burden upon our brethren in the district courts.[7]

C. Legal Authority

Our review discloses no legal authority supporting the proposition that a party enjoys protection under a state procedural rule, practice, or procedure applicable through Rule 62(f), without actively seeking such protection from the

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that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

[7] We note also that Rule 62(f) applies only if certain conditions are met. Requiring a party to file a motion affords the court the ability to analyze whether the movant presented sufficient facts to satisfy these conditions.

district court. Initially, the federal rules specifically provide that an application for an order by the court shall be by motion.[8] The effect of a stay in this situation is indistinguishable from obtaining an order because it bars a successful litigant from taking any action on the judgment. Accordingly, a party must file a motion placing both the court and any adverse party on notice that a stay is sought.

An exhaustive review of the jurisprudence reveals no precedent holding that a party need not file a motion under Rule 62(f). In *Van Huss v. Landsberg*,[9] the Western District of Missouri heard appellant's motion to quash garnishments because Missouri state law provided for an automatic stay until the disposition of a motion for a new trial. While such a motion was pending plaintiff secured a writ of execution and caused summons of garnishee to issue. Appellant sought relief under federal Rule 62(f) but had not filed any motion with the court. The court stated:

> At the outset, this Court believes that the defendant should have filed with the court, with notice to the plaintiff, a request for a stay under the provisions of Rule 62(f) if he sought that rule's protection. There are a number of reasons why such a procedure would seem necessary under this situation. But, without determining the question of the necessity of such a motion, this Court will rule on the merits of this motion to quash.[10]

While mere dicta, these comments confirm our reading of the plain language of Rule 62(f) and the conclusion that there must be a motion to secure a stay under state law. Further, in *White v. Phillips*,[11] the Northern District of Georgia rejected appellee's claim that Rule 62(f) applied automatically, giving appellant a stay under state law and requiring him to post a

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8 Fed. R. Civ. P. 7(b)(1).

9 262 F. Supp. 867 (W.D. Mo. 1967).

10 *Id.* at 869.

11 88 F.R.D. 263 (N.D.Ga. 1980).

supersedeas bond. The court's language was unambiguous: "The Court finds that Fed.R.Civ.P. 62(f) does not serve to automatically stay the execution of a judgment in the absence of a request for a stay by the appellant, even in a case such as the instant one in which under the state law a stay would be automatic."[12]

This interpretation is amply supported by the secondary authorities addressing the issue. In Wright & Miller's learned treatise on civil procedure, the authors opine: "Even though the stay may be automatic in state practice, in federal court a party who seeks the protection of a stay under Rule 62(f) should file with the court, with notice to the plaintiff, the request for the stay."[13] While the authors footnote this sentence to *Van Huss*, their inclusion of this rule reaffirms that the legal authorities considering this issue unanimously interpret Rule 62(f) to require a party to file a motion before enjoying the benefits of a stay.

Our reading of the rule, extensive review of the legal authorities, and consideration of the practical policy ramifications, disclose no persuasive reason for holding that a party may enjoy a state law stay under Rule 62(f) without filing a motion seeking such relief from the court. Accordingly, we conclude and hold that Rule 62(f) did not operate to grant Kmart the claimed automatic stay.

II. Order Imposing Sanctions

A lawyer routinely certifies that any representations made to the court are not being presented for any improper purpose, that the legal contentions are warranted by existing law or the non-frivolous argument for the extension,

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[12] *Id.* at 265; *See also United States v. Kurtz*, 528 F. Supp. 1113, 1114 n.2 (E.D.Pa. 1981) (stating "[b]ecause defendant has not argued that he would be entitled under state law to a stay, the question of his rights under Rule 62(f) is not before us").

[13] 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2907 (2d ed. 1995).

modification, or reversal of the same, and that any allegations have evidentiary support.[14] In light of its interpretation of Rule 62(f), the trial court found that Minor failed to make a reasonable inquiry into the law governing execution of judgments before requesting the writ.[15] The record does not support this finding. Minor did research the relevant case law and consulted secondary sources. His research revealed at least one case in which a district court seemingly approved of a similar execution at a Kmart store.[16] In addition, the court found that Minor was "seeking to embarrass the defendant and call attention to himself as a tireless laborer of the bar attempting to obtain justice for his client when, in fact, there was no basis whatsoever in fact or in law for the actions taken on August 21, 1997." While we recognize the discretion afforded to the district court in the imposition of sanctions, our interpretation of Rule 62(f) necessarily mandates reversal of the trial court's order.

Initially, as noted above, because Kmart did not move for a stay under federal Rule 62(f), it did not enjoy a stay when Minor sought a Writ of Execution. We are aware of no dispositive authority mandating or even suggesting against the seeking of such a writ, and Minor's conduct therefore cannot fairly be characterized as objectively unreasonable. Further, Kmart's actions belie their current contention that they enjoyed a stay under Rule 62(f). Kmart moved for a Rule 62(b) stay pending the court's ruling on the post trial motions, which would have been unnecessary if it already enjoyed a stay under Rule 62(f) because Mississippi Rule 62(a) prevents any execution on a judgment before "the expiration of ten days after the later of its entry or the

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14 Fed. R. Civ. P. 11.

15 The stay under Mississippi Rule 62(a) extended for ten days after the court ruled on Kmart's motion for a new trial. Minor sought, and received, the Writ of Execution only three days after the court's ruling on Kmart's motion.

16 *See Moses v. Kmart Corp.*, 922 F.Supp. 600 (S.D. Fla. 1966).

disposition of a motion for a new trial." While Kmart's Rule 62(b) motion would protect against execution during the period after ten days but before the court's ruling on the post-trial motions, we find its failure to reference Rule 62(f) until its motion for sanctions highly suspect. Accordingly, Kmart's performance herein also persuades that Minor's actions were not legally unreasonable.

Finally, we conclude that any embarrassment suffered by Kmart as a result of Minor's methodology in executing the judgment at the store is insufficient to justify sanctions under Rule 11. Minor sought to execute on a final judgment for his client. He appropriately sought and obtained a Writ of Execution in accordance with the federal rules. Absent exceptional circumstances, the court should not read an ulterior motive into a document filed for a legitimate purpose because "[i]t is not the role of Rule 11 to safeguard a defendant from public criticism that may result from the assertion of non-frivolous claims."[17] Rule 11 treats all filings in the same fashion, whether a complaint or a motion, and Minor's decision to seek a writ of execution passes muster under that Rule.

Kmart's complaint, stripped to essentials, is the manner of execution, accompanying the marshals with media representatives. Our decision is not to be taken as condoning the manner in which Minor executed his lawfully obtained writ. The intentional use of publicity for the purpose of embarrassing an adversary is patently inappropriate, but the decision as to any consequences that might flow from such behavior properly belongs in the hands of the Mississippi authorities and their judgment call as to proper professional performance and penalties for any failure thereof.

Because of our conclusion that a reversal is in order herein because Minor's conduct was not legally unreasonable and therefore not sanctionable, we do not address Minor's motion

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[17] *Sussman v. Bank of Israel*, 56 F.3d 450, 459 (2d Cir. 1995).

for a reversal based on the claim that Kmart inappropriately did not reveal the existence of insurance coverage.

III. Conclusion

Minor's execution of the judgment at the Kmart store was not sanctionable under Rule 11. The district court's order imposing sanctions, therefore, constituted an abuse of discretion and that order is REVERSED. The three pending motions filed by appellant on February 26, 2001 are, accordingly, DENIED as moot.

RHESA HAWKINS BARKSDALE, Circuit Judge, dissenting:

Notwithstanding my great admiration for my brethren in the majority, I respectfully disagree with their holding that the district court abused its discretion in imposing sanctions, pursuant to Rule 11 of the Federal Rules of Civil Procedure. Instead, I would hold that the district court acted within its considerable discretion in ruling that neither Paul S. Minor's writ-request, nor his conduct during its execution, was objectively reasonable.

The majority quite properly labels Minor's "intentional use of publicity for the purpose of embarrassing an adversary ... patently inappropriate", *Maj. Op.* at 12, but leaves it to a state bar to consider. Instead, we should affirm the action taken by the district court, the entity in the best position to -- and that must -- supervise the conduct of attorneys appearing before it. Regretfully, the majority vacates proper sanctions against conduct that was not only intended to harass the defendant, but that was also a flagrant affront to the judicial process. Such conduct made a mockery of the rule of law.

I.

In May 1997, the district court entered an approximate $3.4 million judgment in favor of Minor's clients against Kmart Corporation in an action arising out of heinous acts by two individuals not associated with Kmart: their horrific abduction of a mother and her daughter from a Kmart parking lot in Jackson, Mississippi, and the subsequent, even more horrific, rape of the mother. A jury found Kmart negligent, for failure to provide adequate parking lot security. *See Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265 (5th Cir. 1998).

That June, Kmart timely moved for a remittitur or, alternatively, for a new trial. In addition, under Rule 62(b) of the Federal Rules of Civil Procedure, it requested a stay of execution of judgment, pending resolution of its post-trial motions. The motions were denied in mid-August.

Three days later, Minor requested, and obtained, from the district court clerk a writ of execution for the judgment. Although the district court did not make a finding of fact on this point, Kmart asserts, and Minor does not dispute, that he notified the media about the forthcoming writ-execution. Thereafter, with invited media representatives present, Minor, accompanied by United States Marshals, entered the Kmart and began to execute on the judgment, by seizing currency in the store's cash registers and its vault.

While at Kmart, Minor was interviewed by the media; subsequently, reports about the writ-execution, including Minor's extremely intemperate statements, were, among other things, presented in at least three television newscasts. In those broadcast interviews, and even though it was only three days after denial of the new trial motion and significant time remained for Kmart to file a notice of appeal and post a supersedeas bond, Minor: characterized Kmart's actions as arrogant and outrageous and asserted it would not pay the judgment; charged his clients had been victimized twice by Kmart, once by being abducted there and once by Kmart's

not paying the judgment; and proclaimed he was there to ensure Kmart did what it was supposed to do.

While the writ-execution was in progress, and upon learning of Minor's actions, the district court directed him to cease and desist and set a teleconference with the parties. During that conference, the district court directed Kmart to submit a supersedeas bond, which was later approved.

A few days after Minor's attempted execution of judgment, Kmart moved for sanctions, pursuant to Rule 11. It asserted Minor violated a ten day stay of execution of judgment, claimed to be in effect pursuant to Rule 62(f) of the Federal Rules of Civil Procedure, which incorporates Rule 62(a) of the Mississippi Rules of Civil Procedure. Federal Rule 62(f) provides:

Stay According to State Law. In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, *to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state.*

Fed. R. Civ. P. 62(f) (emphasis added). Mississippi Rule 62(a) provides in part:

Automatic Stay; Exceptions. Except as stated herein or as otherwise provided by statute or by order of the court for good cause shown, *no execution shall be issued upon a judgment* nor shall proceedings be taken for its enforcement *until the expiration of ten days after* the later of its entry or *the disposition of a motion for a new trial.*

Miss. R. Civ. P. 62(a) (emphasis added).

According to Kmart, because, under Mississippi Rule 62(a), a ten day stay is automatic in Mississippi state courts after disposition of a new trial motion, the application of that rule, through Federal Rule 62(f), resulted in such a stay for

Kmart. It also asserted that Minor, without justification, appeared at the Kmart with the media and "orchestrated damage to Kmart, its business and goodwill".

Minor responded that, following denial of the new trial motion, Kmart had not moved under Federal Rule 62(f) for the Mississippi Rule 62(a) automatic stay. Therefore, according to Minor, no stay had been in effect.

After reviewing the precedent regarding Rule 62(f), the district court ruled: a motion is not a prerequisite to such a stay; and Kmart was protected by it. *Whitehead v. K Mart*, No. 3:95-cv-827WS, at 14 (S.D. Miss. 31 Mar. 1999) (*Whitehead-USDC*). The district court concluded that Minor had failed to make a "reasonable inquiry into the law governing execution of judgments in the instant case", and was, therefore, subject to sanction. *Id.* at 15. Regarding Minor's collateral media-actions, the district court found: "It is clear ... that [Minor] was seeking to embarrass [Kmart] and call attention to himself as a tireless laborer of the bar attempting to obtain justice for his client when, in fact, there was no basis whatsoever in fact or in law for the actions taken on August 21, 1997". *Id.* at 16-17.

As a result, Minor was ordered to pay Kmart approximately $8,000 -- the attorney's fees it incurred in opposing execution of judgment. *Id.* at 17. Although Kmart requested a public apology by Minor, the district court determined that publication of its sanctions opinion would suffice. *Id.* (Pending appeal of its ruling, that opinion has not been published.)

II.

The able majority errs in two critical respects: (1) deciding, as it does, whether a motion is required to trigger a stay under Rule 62(f) is unnecessary, because at issue is whether, pursuant to Rule 11, Minor's actions were objectively reasonable in the light of then existing legal authority; and (2) the majority discounts Minor's media-actions and leaves

to a state bar the task entrusted to federal courts under Rule 11.

Rule 11 provides in pertinent part:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, *formed after an inquiry reasonable under the circumstances*, --
>
> (1) *it is not being presented for any improper purpose*, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; [and]
>
> (2) the claims, defenses, and other legal *contentions therein are warranted* by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law....

Fed. R. Civ. P. 11 (b) (emphasis added). Each obligation must be satisfied; violation of either justifies sanctions. *See, e.g., Walker v. City of Bogalusa*, 168 F.3d 237, 241 (5th Cir. 1999). And, in reviewing compliance *vel non* with each obligation, "the standard under which an attorney is measured is an objective, not subjective, standard of reasonableness under the circumstances". *Childs v. State Farm Mut. Auto. Ins. Co.*, 29 F.3d 1018, 1024 (5th Cir. 1994).

The imposition of Rule 11 sanctions is reviewed for an abuse of discretion. *E.g., Lulirama Ltd., Inc. v. Axcess Broad. Servs., Inc.*, 128 F.3d 872, 884 (5th Cir. 1997). "This standard is necessarily deferential because, based on its '[f]amaliar[ity] with the issues and litigants, the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11.'" *Id.* (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990); emphasis added). Accordingly, as the majority recognizes, we owe "great deference" to the sanctions order. *Maj. Op.* at 4.

The nature of sanctions authorized by Rule 11 reflects the considerable discretion vested in the district court:

> A sanction imposed for violation of this rule shall be limited to what is *sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.* Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

Fed. R. Civ. P. 11(c)(2) (emphasis added). As noted, sanctions are appropriate for violation of either of the above-quoted Rule 11 obligations.

A.

The majority deals primarily with whether, under Federal Rule 62(f), a motion is necessary to trigger the Mississippi Rule 62(a) automatic stay. Because resolution of this issue is unnecessary, a large part of the majority opinion is dictum. Under Rule 11, in assessing an attorney's legal claims, this court has held that he need not provide an absolute guarantee of the correctness of the legal theory advanced in the papers he files. Rather, the attorney must certify that he has conducted reasonable inquiry into the relevant law. Then, regardless of whether the attorney's view of the law is erroneous, sanctions can be imposed only if his position can fairly be said to be unreasonable from the point of view of both existing law and its possible extension, modification, or reversal.

FDIC v. Calhoun, 34 F.3d 1291, 1296 (5th Cir. 1994) (internal quotation marks and citations omitted). Accordingly, we should focus on: whether Minor undertook a reasonable inquiry into authority regarding Rule 62(f); and, if he did, whether his actions were objectively reasonable.

In a supplemental affidavit in opposition to the sanctions motion, Minor states he undertook an inquiry into the applicability of Rule 62(f) and determined, under *Van Huss v. Landsberg*, 262 F. Supp. 867 (W.D. Mo. 1967), and 11 Wright, Miller & Kane, Federal Practice & Procedure § 2907 (1995), that, because Kmart had not filed a motion seeking a stay under Rule 62(f), no stay was in effect. He also stated he "relied on the fact that [, when it had earlier moved for a new trial,] Kmart had requested a stay under Fed. R. Civ. P. 62(b), which was unnecessary if Kmart believed that it was automatically entitled to a stay under Rule 62(f), and was inconsistent with any claim to a Rule 62(f) stay".

Minor's reliance on *Van Huss* was not objectively reasonable. There, the district court's observation that the defendant should have filed a stay request with the court is, as Minor admits, dictum. In *Van Huss*, subsequent to a new trial denial, the defendant never requested a stay of execution of judgment. The plaintiff then requested a writ of execution and "caused summons of garnishee to be issued and served". 262 F. Supp. at 868. The defendant moved to quash, asserting that, under Rule 62(f) and Missouri law, he was entitled to a stay. *Id.* at 868-69.

The district court observed that "the defendant *should* have filed with the court . . . a request for a stay under the provisions of Rule 62(f) if he sought that rule's protection.... But, *without determining the question of the necessity of such a motion*, this Court will rule on the merits of this motion to quash". *Id.* at 869 (emphasis added). Here, the district court correctly noted that, "when [the *Van Huss* court] expressed [its] personal belief that a motion should be made before one may seek a stay under Rule 62(f), [the court] was not stating as a matter of law what Rule 62(f) requires". *Whitehead-USDC*, at 8.

Likewise, Minor's reliance on 11 Wright, Miller & Kane, Federal Practice & Procedure § 2907 (1995) did not provide an objectively reasonable basis for his conduct. That treatise merely advises: "Even though the stay may be automatic in

state practice, in federal court a party who seeks the protection of a stay under Rule 62(f) *should* file with the court ... the request for the stay". *Id.* (emphasis added). It goes without saying that the use of the term "should" does not convey to the objectively reasonable reader that a motion is required. Instead, this language conveys the message that filing a motion is a prudent course of action. Furthermore, for this proposition, the treatise relies upon the *Van Huss* dictum.

Turning to other authorities now relied upon by Minor and the majority, Minor looks to *Moses v. K-Mart Corp.*, 922 F. Supp. 600 (S.D. Fla. 1996), *rev'd in part*, 136 F.3d 140 (11th Cir. 1998), where the district court approved a judgment creditor's execution of a judgment prior to approval of a supersedeas bond. Although Minor cited *Moses* in his response to the sanctions motion and in his initial affidavit in support of that response, he did not list *Moses* in his supplemental affidavit as authority upon which he relied in seeking the writ.

Nevertheless, as Minor admits, *Moses* does not address the requirements of Rule 62(f). Moreover, *Moses* is distinguishable. There, the judgment creditor waited three months after the stay of execution had expired and informed the district court it was seeking to execute judgment. *Id.* at 601-02. In contrast, Minor waited only three days after the new trial denial, at which point, according to Minor, any stay expired; and, other than the writ- request to the court clerk, Minor did not disclose to the district court his intentions to execute on that judgment.

Any reliance by Minor on *White v. Phillips*, 88 F.R.D. 263 (N.D. Ga. 1980), was also objectively unreasonable. Although Minor now relies upon *White*, he did not cite it in either his response to the sanctions motion or in his initial affidavit; and, consistent with his treatment of *Moses*, he did not cite *White* in his supplemental affidavit as authority upon which he relied in seeking the writ.

In any event, the judgment creditor in *White* moved, pursuant to Federal Rule 62(a), that the judgment debtor be required to post a supersedeas bond. According to the creditor, an appellee creditor, under Georgia law, may obtain an order requiring an appellant debtor to post bond. The court concluded that Federal Rule 62(a) was not applicable, but that Federal Rule 62(f) was. It ruled, however, that the debtor did not have to post bond because he had not moved for a stay under Rule 62(f). And, it observed that Rule 62(f) "does not serve to automatically stay the execution of a judgment in the absence of a request for a stay by the appellant, even in a case such as the instant one in which under the state law a stay would be automatic". *Id.* at 265. This language is *dictum*; at issue in *White* was whether the judgment debtor was required to move for a stay under Federal Rule 62(f) in order to be required to post bond, not whether a motion was required to qualify for an automatic stay granted by state law. As noted, Minor also asserted in his supplemental affidavit that, because Kmart had moved for a stay under Federal Rule 62(b) when it had earlier moved for a new trial, such action was inconsistent with any belief that, post-denial of that motion, a stay existed pursuant to Federal Rule 62(f). Reliance upon this theory was not objectively reasonable either. Obviously, Kmart's utilizing an alternative method for securing a stay pending a ruling on its new trial motion did not operate to abandon a stay emanating from another source, such as Federal Rule 62(f), following the ruling.

Because of policy considerations concerning varying state law, the majority concluded a motion is required to trigger Federal Rule 62(f) because the converse would be "unwise and inappropriate and [it] therefore decline[d] to impose such a heavy and unnecessary burden upon our brethren in the district courts". *Maj. Op.* at 7. But, surely, such burden-shifting considerations are not part of the decisional calculus for an attorney seeking to comply with Rule 11. In short, what the majority observes is quite true: there is no clear authority that a motion under Federal Rule 62(f) is not

necessary to trigger the Mississippi Rule 62(a) automatic stay. *Id.* at 9-10. But, the converse is also true: there is no authority that a motion *is* required.

Therefore, the objectively reasonable course of action would have been to have sought clarification from the district court. This is because of (1) the lack of an express motion requirement in Rule 62(f); (2) the uncertain nature of the law regarding Rule 62(f); and (3) the clear language of Mississippi Rule 62(a) that, at least in Mississippi courts, there is an *automatic* ten day stay of execution from the date of a new trial motion denial.

Accordingly, Minor's writ-request was not objectively reasonable and warrants the imposition of Rule 11 sanctions. Restated, the district court did not abuse its discretion in awarding sanctions on that basis.B.

As discussed, the district court had another, independent basis for the award: its finding that Minor's conduct during the attempted writ-execution was "for [a proscribed] improper purpose", *see* Fed. R. Civ. P. I l(b)(1): harassing Kmart. For this point, Minor's attempted execution of judgment is not the issue; his underlying "improper purpose" is. Again, his conduct is subject to a standard of objective reasonableness. *See Childs*, 29 F.3d at 1024.

The majority concludes that any embarrassment suffered by Kmart as a result of Minor's methodology in executing the judgment at the store is insufficient to justify sanctions under Rule 11. Minor sought to execute on a final judgment for his client. He appropriately sought and obtained a Writ of Execution in accordance with the federal rules. *Absent exceptional circumstances*, the court should not read an *ulterior motive* into a document filed for a legitimate purpose....

Maj. Op. at 12 (emphasis added). It then states that, while it does not condone Minor's actions, and while, in fact, those actions were "patently inappropriate", any discipline should flow from a state bar. *Id.*

The majority's "exceptional circumstances" exception is present here. Minor's conduct is precisely the type Rule 11 is designed to address and remedy; and the district court's fact-based determination that the writ-request was for the purpose of harassing Kmart, as evidenced by the totally unnecessary and collateral media-play, is entitled to great deference.

Certainly, that finding was not clearly erroneous. It was against the backdrop of earlier improper actions by Minor during trial. For example, the district court had sanctioned him $1,000 for failing, when an objection was made, to respond to the court, rather than to opposing counsel, despite the court's instructions to Minor to do so. *See Whitehead*, 163 F.3d at 277 n.3.

The district court did not abuse its discretion. It spoke with counsel for the parties, including Minor, on the day of the incident and was, needless to say, in a far, far better position than we to rule on Rule 11 sanctions. Obviously, this is why we review its decision under a very deferential abuse of discretion standard.

III.

For the foregoing reasons, I would hold the district court did not abuse its discretion in imposing Rule 11 sanctions. Because my esteemed brethren in the majority hold otherwise, I must respectfully dissent.

In any event, in the light of the majority's conclusion that Minor's "intentional use of publicity for the purpose of embarrassing an adversary is patently inappropriate" and is for a state bar to consider, *Maj. Op.* at 12, it is hoped that, at the very least, the district court will so refer this matter.

APPENDIX C

UNITED STATES DISTRICT COURT
S.D. MISSISSIPPI,
JACKSON DIVISION

BENNIE WHITEHEAD; ET AL.,
Plaintiffs,

v.

K MART CORPORATION,
Defendant.

No. Civ.A. 3:95CV827WS.

March 30, 1999

WINGATE, District Judge.

Before the court is the defendant's motion asking this court to impose sanctions upon plaintiffs' attorney, Paul S. Minor. Defendant's motion is predicated upon Rule 11[1] of the

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[1] Defendant seeks imposition of sanctions pursuant to Rule 11(b) and 11(c)(1)(B) of the Federal Rules of Civil Procedure. Rule 11(b) provides in pertinent part that, "[b]y presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal

Federal Rules of Civil Procedure and upon Title 28 U.S.C. § 1927.[2] This court has reviewed the briefs, heard the argument of counsel and, notwithstanding Minor's objection, finds that defendant's motion has merit and that this court should impose appropriate sanctions upon the plaintiffs' attorney.

Background

On May 27, 1997, this court entered a judgment in the amount of approximately 3.4 million dollars in the above-styled and numbered cause in favor of the plaintiffs after a jury verdict determining that the defendant was liable to the plaintiffs. Plaintiffs had charged, and the jury had agreed, that defendant K-Mart Corporation had negligently failed to provide safe premises for plaintiffs who had been kidnapped

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contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief".

Rule 11(c)(1)(B) provides that, "On its own initiative the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto."

[2] Title 28 U.S.C. § 1927 provides that, "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

from defendant's parking lot, unattended by security, and later sexually assaulted.

After entry of judgment, the defendant timely moved for a new trial[3] or for remittitur on June 9, 1997. The defendant also asked for stay of execution of judgment under Rule 62(b)[4] of the Federal Rules of Civil Procedure pending disposition of its motion for new trial or to alter or amend the judgment which was made pursuant to Rule 59. This court entered Orders denying defendant's request for a new trial; denying the motion for remittitur; and denying the Rule 62(b) motion for stay on August 18, 1997. This court's denial of the defendant's motion for stay under Rule 62(b) may have been superfluous since the request for a new trial and the motion for a remittitur were denied at the same time.[5] This court's Orders, however, did not address, nor was the court asked to address, the provisions of Rule 62(f) of the Federal Rules of Civil Procedure which provides in pertinent part that "[i]n any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is

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[3] A motion for new trial is governed by Rule 59 of the Federal Rules of Civil Procedure. Rule 59(b) provides that, "any motion for new trial shall be filed no later than 10 days after entry of judgment." Rule 6(a) of the Federal Rules of Civil Procedure excludes the entry date of the judgment from consideration in all cases and excludes intermediate holidays and weekends whenever a rule such as Rule 59(b) establishes a time period of less than 11 days. *See U.S. Leather, Inc. v. H & W Partnership*, 60 F.3d 222, 225 (5th Cir.1995). The deadline for the defendant's motion for a new trial in the instant case was June 10, 1997.

[4] The motion for stay was submitted pursuant to Rule 62(b) which provides in pertinent part that, "the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for new trial or to alter or amend judgment made pursuant to Rule 59, ..."

[5] For purposes of proper administrative record keeping, this court must address specifically each element of a party's motion(s) so that the motion(s) will be fully accounted for and reconciled.

entitled, in the district court therein, to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state."

Three days after this court's Orders denying new trial, remittitur and stay, the plaintiffs obtained a writ of execution on this court's judgment from the Clerk of the Court. Plaintiffs' attorney then went to a K-Mart Corporation facility in Jackson, Mississippi, and attempted to execute this court's judgment by seizing the proceeds of that store's cash registers and safe. According to the defendant, plaintiffs' attorney engaged in press manipulation, accusing K-Mart of irresponsibility and failure to pay its just debts while charging that the judgment amount obtained in this court was past due because of K-Mart's refusal to pay. Because of the actions of the plaintiffs' attorney, the story the plaintiffs' attorney sought to communicate to the media, that of K-Mart failing to pay a just and past-due judgment obtained in federal court, was widely circulated. Furthermore, says defendant, the plaintiffs' attorney claimed to be acting with the authority of this court when he attempted to execute the judgment.

Upon being made aware of the course of action taken by the plaintiffs' attorney in his attempt to execute this court's judgment, this court directed the plaintiffs' attorney through the United States Marshal's office to cease and desist pending a telephone conference with the court. At this conference, the defendant was directed to submit to the court and to the plaintiffs' attorney a proper supersedeas bond so that all matters in this case might be stayed pending appeal. Defendant's counsel reserved the right to submit a motion for sanctions. The bond for the amount of 125% of the judgment was submitted to and approved by the court and by the plaintiffs' attorney. Then, on August 26, 1997, after having reserved the right to do so, the defendant filed this motion for sanctions.

Defendant's Argument for Sanctions

Defendant argues that, in view of Rule 62(f) of the Federal Rules of Civil Procedure and Rule 62(a) of the Mississippi Rules of Civil Procedure, plaintiffs' execution of judgment was premature since it was unsupported by the applicable law; wholly unauthorized; and pursued vexatiously to unnecessarily multiply litigation, as well as to embarrass and humiliate the defendant. Defendant claims that its good will and business reputation were maligned by the misrepresentations of plaintiffs' attorney concerning the judgment in this case. In pursuing his ostentatious play to the news media, says defendant, the plaintiffs' attorney ignored the rules applicable in the State of Mississippi pertaining to stays of execution of judgments obtained in the United States District Courts of Mississippi when he conducted a premature execution of the judgment only three days after this court's orders denying new trial on August 18, 1997.

Had this case been brought in the appropriate Mississippi court, says defendant, the defendant, as a judgment debtor against whose property the judgment operated as a lien,[6]

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[6] This court notes that Mississippi Code Annotated Section 11- 7-191 provides in pertinent part that "[a] judgment so enrolled shall be a lien upon and bind all the property of the defendant within the county where so enrolled, from the rendition thereof, and shall have priority according to the order of such enrollment, in favor of the judgment creditor, his representatives or assigns, against the judgment debtor and all persons claiming the property under him after the rendition of the judgment." *See Motors Securities Company v. B.M. Stevens Company*, 225 Miss. 361, 83 So. 2d 177, 179 (1955) (quoting Section 1555, Code of 1942, which provides that, "[a] judgment so enrolled shall be a lien upon and bind all the property of the defendant within the county where so enrolled . . ."). Thus, this court agrees with the defendant's contention that the requirement under Rule 62(f) of the Federal

would have been entitled to an automatic stay of ten days after this court's disposition of the motion for new trial pursuant to Rule 62(a) of the Mississippi Rules of Civil Procedure. Rule 62(a) of the Mississippi Rules of Civil Procedure provides in pertinent part that "no execution shall be issued upon a judgment . . . until the expiration of ten days after its entry or the disposition of a motion for a new trial, whichever last occurs." (emphasis added). In the instant case, judgment was entered on May 27, 1997. However, the defendant timely moved on June 9, 1997, for a new trial, for remittitur, and for stay. The defendant's motions were denied on August 18, 1997. According to Rule 62(f) of the Federal Rules of Civil Procedure, argues defendant, the defendant was entitled to whatever stay would have been accorded under state law. Mississippi's Rule 62(a) provides that no execution could be issued on the plaintiffs' judgment until ten (10) days after this court had ruled on the defendant's motion for new trial. Thus, says defendant, it was entitled to rely on the provisions of the Mississippi rule.

While reserving its right to sue plaintiffs' attorney for defamation and abuse of process, the defendant asks this court to impose monetary sanctions equal to the attorney fees incurred by the defendant in the process of opposing the plaintiffs' execution of judgment; to award damages incurred by the defendant due to the actions of plaintiffs' attorney; and to require plaintiffs' attorney Paul S. Minor to cause to be published in the Clarion Ledger, a newspaper of general circulation, a printed apology to this court, and to the employees and customers of K-Mart for the actions taken on August 21, 1997. The defendant asks that Paul S. Minor be required to distribute this apology to other news media with the same vigor as was exercised on August 21, 1997. The defendant wants said apology to state that Paul S. Minor appeared at K-Mart to execute judgment with the assistance of United States Marshals, but without proper legal basis for

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Rules of Civil Procedure that a judgment be a lien upon the property of the judgment debtor is satisfied.

doing so. Defendant also asks that the publication of the apology in the Clarion Ledger occupy at least the same amount of space as did the news reports generated by Minor's actions. Finally, the defendant asks this court to assess monetary damages, if any, incurred by the Clerk of this court and the United States Marshals as the result of Paul S. Minor's use and/or abuse of their services.

Plaintiffs' Response

The plaintiffs' attorney responds that the 10-day stay under Rule 62(a) of the Federal Rules of Civil Procedure had expired in the instant case because the defendant never specifically moved for a stay pursuant to Rule 62(f). Thus, says plaintiffs' attorney, the defendant no longer was entitled to a stay of execution after August 18, 1997. The plaintiffs' attorney relies on the case of *Van Huss v. Landsberg*, 262 F.Supp. 867, 869 (W.D.Mo.1967), and other cases, for the proposition that the defendant should have filed a motion for a stay under Rule 62(f) after judgment was entered in order to have benefit of that form of stay of execution. Failure to have done so prior to this court's August 18, 1997, denial of the defendant's motion for new trial, says plaintiffs' attorney, now precludes defendant's reliance upon Rule 62(f).

Analysis

This court has reviewed closely the *Van Huss* decision and is unpersuaded that this case stands for the proposition that one must file a motion for stay under Rule 62(f) prior to being entitled to the benefit of the stay under state law. In *Van Huss v. Landsberg*, Judge Collinson there stated that he "believes that the defendant should have filed with the court, with notice to the plaintiff, a request for a stay under the provisions of Rule 62(f) if he sought that rule's protection.... But, without determining the question of the necessity of such a motion, this Court will rule on the merits of this motion to quash (garnishment)." Thus, when Judge Collinson expressed his personal belief that a motion should be made

before one may seek a stay under Rule 62(f), he was not stating as a matter of law what Rule 62(f) requires.

Significantly, counsel for plaintiffs' attorney agrees that in a Mississippi court a party would be entitled to an automatic stay of execution for a period of ten days either after entry of the judgment or after a motion for new trial has been disposed of pursuant to Rule 62(a) of the Mississippi Rules of Civil Procedure. Plaintiffs' attorney has not explained to this court's satisfaction why the defendant in the instant case would not also be entitled to what Rule 62(a) of the Mississippi Rules of Civil Procedure provides without having to file a separate motion for such relief.

Still, in support of his argument, plaintiffs' attorney cites the case of *Moses v. K-Mart Corporation*, 922 F.Supp. 600 (S.D.Fla.1996), where the district court approved of an execution of judgment very similar to the one attempted by plaintiffs' attorney in the instant case. However, *Moses v. K-Mart Corporation* relied solely upon Rule 62(a) of the Federal Rules of Civil Procedure which does not contain the same language as Rule 62(a) of the Mississippi Rules of Civil Procedure--that execution of a judgment is automatically stayed until the expiration of ten days after its entry or the disposition of a motion for a new trial, whichever last occurs. Moreover, under Rule 9.310 of the Florida Rules of Appellate Procedure pertaining to stays pending review, "a party seeking to stay a final or non-final order pending review *shall file a motion in the lower tribunal*, which shall have continuing jurisdiction, in its discretion, to grant, modify, or deny such relief. A stay pending review may be conditioned on the posting of a good and sufficient bond, other conditions, or both." The commentary following Rule 9.310 explains this language, stating that, "there are no automatic stays of mandate under these rules, except for the state or a public body under subdivision (b)(2) of this rule, or if a stay as of right is guaranteed by statute." Thus, the district court for the Southern District of Florida had before it a procedural scheme with regard to stays of execution of judgment under Florida law which is quite different from that

provided by Rule 62(a) of the Mississippi Rules of Civil Procedure. Consequently, this court finds *Moses v. KMart Corporation* unpersuasive.

Plaintiffs' attorney also relies on *White v. Phillips*, 88 F.R.D. 263 (N.D.Ga.1980), where the plaintiff sought to require the defendant to post bond pending appeal pursuant to Georgia law which did not require a bond pending appeal unless the plaintiff specifically requested that the bond be imposed. The plaintiff in *White v. Phillips* relied on Rule 69(a) of the Federal Rules of Civil Procedure which states in pertinent part that, "proceedings in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held...." Thus, argued the plaintiff, a bond motion by the plaintiff should be granted because Georgia law permitted such motions. The district judge disagreed, noting that there was no provision in the Federal Rules of Civil Procedure or the Federal Rules of Appellate Procedure at that time which spoke to the question of when a supersedeas bond might be required except the provisions which related to stays of execution. Turning to Rule 62(f) of the Federal Rules of Civil Procedure, the district court opined that this rule did not automatically stay the execution of judgment in absence of a request for stay, even where under state law a stay would be automatic, especially where the defendant had made no motion whatsoever for a stay. Thus, concluded the district court, it would violate the Federal Rules of Civil Procedure to require the defendant to post bond when he had not even sought a stay of the judgment. The motion to require the defendant to post bond was denied.

White v. Phillips stands on different factual underpinning from the instant case. The defendant in that case sought no stay of execution whatsoever. Meanwhile, it was the plaintiff, rather than the defendant, who sought to have benefit of a state statute. Given the circumstances, the Georgia district court held that Rule 62(f) was not designed to provide the plaintiff the right to have a bond posted. In dicta, the district court stated that the defendant could have benefit of Rule 62(f) upon request, but that the defendant had

not done so. Thus, the Georgia district court had no basis upon which to grant the plaintiff's motion for a bond pending appeal. This court finds *White v. Phillips* to have no application in the instant case.

Plaintiffs' attorney also cites 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2907 (2nd ed. 1995) for the contention that the defendant in the instant case must file a motion with this court in order to have benefit of a stay according to state law. This court has reviewed closely the section of this most learned treatise cited by plaintiffs' attorney and finds that the treatise merely recites the language uttered by Judge Collinson in the *Van Huss* case--that the defendant should have filed with the court, with notice to the plaintiff, the request for a stay. As this court previously noted, Judge Collinson did not state that a request or motion was required as a matter of law, and the treatise does not say that such motion shall or must be filed.

In interpreting a statute, the court should begin with its plain language. *See Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 1035 (5th Cir.1990). Rule 62(f) by its language does not require that a motion be filed for the relief it provides. The Rule says that a judgment debtor is *entitled*, in the district court held therein, to such stay as would be accorded him had the action been maintained in the courts of that state. This court ascertains no ambiguity on this point. A statute is "ambiguous" only if it is susceptible to more than one meaning. *United Services Automobile Association v. Perry*, 102 F.3d 144, 146 (5th Cir.1996), citing *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 227- 28, 114 S.Ct. 2223, 2230, 129 L.Ed.2d 182 (1994); *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418-19, 112 S.Ct. 1394, 1402-03, 118 L.Ed.2d 52 (1992); and Norman J. Singer, 2A Sutherland Statutory Construction § 45.02 (5th ed.1992). In this court's view, had Congress intended that a party file a motion in order to establish the foundation for the judgment debtor's

entitlement to a stay under Rule 62(f), then it would have provided expressly for this requirement.

In reaching a determination whether Congress has spoken directly on an issue, courts are free to consider both the plain language and meaning of the statute in question and any pertinent legislative history. *Doyle v. Shalala*, 62 F.3d 740, 745 (5th Cir.1995). This court had searched diligently for the legislative history of Rule 62(f) of the Federal Rules of Civil Procedure in order to determine whether Congress contemplated requiring a party seeking benefit of a stay pursuant to state law always to file a motion for such relief. This court found that Rule 62(f) derives from Revised Statute § 988[7] which was incorporated into the United States Code before the turn of this century. *See* 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2907, p. 527 n. 1 (2nd ed.1995). However, the Congressional Record on the day this statute was passed provides no account of any debate or other discussion.

Therefore, left with the unambiguous assertions of the involved rules, this court concludes that a motion is not a predicate to a judgment debtor's entitlement to a stay pursuant to Rule 62(a) of the Mississippi Rules of Civil Procedure. Rule 62(f) of the Federal Rules of Civil Procedure provides that a judgment debtor is entitled to a stay accorded him by state law. Rule 62(a) provides that no execution shall be issued upon a judgment until the expiration of ten days after its entry or the disposition of a motion for a new trial. No motion is required of a judgment debtor in order to have benefit of this relief under state law.

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[7] Rev. St. Sec. 988 (U.S.Comp.St.1901, p. 708), taken from Act Cong. May 19, 1828, c. 68, Sec. 2, 4 Stat. 281, provides that in any state where judgments are liens upon the property of defendants, and where, by the laws of such state, defendants are entitled to a stay of execution for one term or more, defendants in federal actions shall be entitled to a stay for one term. *See Petrified Bone Mining Co. v. Rogers*, 159 F. 1019 (E. D.Pa.1908).

The Fifth Circuit has stated that the purpose of Rule 62(f) is to allow an appealing judgment debtor to receive in the federal forum what he otherwise would receive in the state forum. *Castillo v. Montelepre, Inc.*, 999 F.2d 931, 942 (5th Cir.1993). This purpose, says the Fifth Circuit, is qualified only by the requirement that the state forum treat judgments as liens or encumbrances on the property of judgment debtors. This qualification clearly is met in the instant case under the provisions of Mississippi Code Annotated Section 11-7-191. Accordingly, this court finds that the defendant had ten days from this court's August 18, 1997, ruling before execution of judgment could proceed.[8]

Rule 11 Application

Paul S. Minor presented to this court a letter requesting a writ of execution of judgment (a pleading, written motion, or other paper) certifying that to the best of his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that the request for a writ of execution was proper; and that the letter requesting the writ of execution was not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. In light of the foregoing, contrary to Minor's argument in opposition, this court is persuaded that Paul S. Minor failed to make a reasonable inquiry into the law governing execution of judgments in the instant case. *See Lulirama Ltd., Inc. v. Axcess Broadcast Services, Inc.*, 128 F.3d 872, 884 (5th

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[8] Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides in relevant part that if a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. *See Huff v. International Longshoremen's Association*, 799 F.2d 1087, 1089 (5th Cir.1986). Thus, the thirty-day period for filing a notice of appeal also was suspended in the instant case while the defendant's motion for new trial under Rule 59 was pending.

Cir.1997), (holding that whether by signing, filing, submitting, or later advocating a pleading, written motion, or other paper, an attorney ... is certifying that to the best of his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that the pleading or other paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and/or that the claims, defenses, and other legal contentions in the pleading or paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law); *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 873-74 (5th Cir.1988) (recognizing that the failure to make reasonable inquiry is sanctionable).

Finally, the plaintiffs' attorney claims that the defendant has failed to follow the "safe harbor" provision of Rule 11 by serving the motion for sanctions on the plaintiffs' attorney 21 days prior to filing it as required by Rule 11, as amended.[9]

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[9] Rule 11 was amended effective December 1, 1993. *Elliott v. Tilton*, 64 F.3d 213, 215 (5th Cir.1995). The amended Rule 11(c)(1)(A) now provides in pertinent part as follows:

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. *A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the*

This court finds that Rule 11' s "safe harbor" provision does not apply in the instant case. As the plaintiffs' attorney has noted, there is no notice required when a judgment is executed. Once the plaintiffs' attorney proceeded with the premature execution of judgment in this case, the deed was done. The defendant had no opportunity to comply with the safe harbor provision of Rule 11.

Additionally, the defendant has submitted to this court several of the articles and news reports which were generated in the local press by the improper execution of judgment in the instant case. It is clear from these unchallenged submissions that the plaintiffs' attorney was seeking to embarrass the defendant and call attention to himself as a tireless laborer of the bar attempting to obtain justice for his client when, in fact, there was no basis whatsoever in fact or in law for the actions taken on August 21, 1997. Thus, this court is persuaded that the imposition of appropriate sanctions in this case is justified and proper.

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challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

The amendment is intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation. *Elliott*, 64 F.3d, at 216. Thus, under Rule 11 as it is now revised, the timely withdrawal of a contention will protect a party against a motion for sanctions. *See Proposed Amendments to Federal Rules of Civil Procedure*, advisory committee's notes, reprinted in, 146 F.R.D. 401, 591 (1993).

Sanctions

Rule 11(c)(2) provides that a sanction imposed for violation of Rule 11 shall be limited to what is sufficient to deter repetition of such conduct by others similarly situated and may include reasonable attorney fees and other expenses incurred as the result of the violation. *Olcott v. Delaware Flood Company*, 76 F.3d 1538 1554 (10th Cir.1996); *Crank v. Crank*, 1998 WL 713273 (N.D.Tex.), decided October 8, 1998 (noting that the standard established by Rule 11(c)(2) is similar to the standard established in *Thomas v. Capital Security Services, Inc.* that any penalty imposed must be the least severe sanction adequate to serve the purpose).

This court hereby directs the plaintiffs' attorney Paul S. Minor to pay the defendant's attorney fees incurred in presenting its opposition to the premature execution of judgment in the amount of $7,685.00. This court has reviewed these attorney fees and finds them reasonable. Said payment shall be made within ten (10) days of the date of this order. The defendant asks additionally for a published apology from the plaintiffs' attorney; however, the defendant agrees that this court's published opinion adequately would satisfy this request. The defendant claims to have suffered damages as the result of the opposing attorney's conduct, but the defendant has reserved the right to sue the plaintiffs' attorney for defamation and abuse of process. Therefore, this court will not award tort-related damages attributable to the actions of plaintiffs' counsel since such damages would be a matter to be resolved in other litigation not directly related to this motion for sanctions. Finally, the defendant asks this court to award itself through the Clerk of the Court any damages this court has incurred with regard to the premature execution of judgment and to award the United States Marshal's Service any fees and expenses that it has incurred. This court hereby declines to impose any damages for payment to the Clerk of the Court. This court finds, however, that the plaintiffs' attorney still owes the United States Marshal's Service an amount of just over three dollars for their assistance with serving and executing the improper

lien. Plaintiffs' attorney is hereby directed to satisfy that account within ten (10) days of the date of this order.

202 F.Supp.2d 525

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00-60574

BENNIE WHITEHEAD; SUSAN WHITEHEAD, INDIVIDUALLY AND AS MOTHER AND ADULT NEXT FRIEND OF AMY WHITEHEAD A MINOR,

Plaintiffs-Appellees,

V.

FOOD MAX OF MISSISSIPPI, INC.; ET AL.,

Defendants.

KMART CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Mississippi

Decided: December 16, 1998

Before JOLLY, BARKSDALE, and BENAVIDES, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge.

A jury having found that Kmart's failure to provide adequate security for its parking lot was a cause of the abduction of Mrs. Whitehead and her daughter, and ensuing heinous criminal acts, the principal presented in Kmart's appeal from the judgment in this Mississippi diversity action, by which Kmart seeks a new trial, is whether, because of the Whiteheads' closing argument, the jury was influenced by passion and prejudice in awarding damages of $3.4 million. Concluding that the jury was so influenced, we must REVERSE and REMAND for a new trial on damages; we AFFIRM as to liability.

I.

Mrs. Susan Whitehead and her then twelve-year-old daughter, Amy Whitehead, were abducted at knife-point from Kmart's parking lot at Beasley Road in Jackson, Mississippi, at approximately 8:30 p.m. on 18 October 1992. The two teenage assailants, Shanta Jones and James Seaton, forced the Whiteheads into Mrs. Whitehead's vehicle. After robbing Mrs. Whitehead of the money in her purse (totaling four dollars), the assailants drove the Whiteheads to an ATM machine and had Mrs. Whitehead make a withdrawal. Seaton and Jones then drove the Whiteheads to a remote location where, outside the vehicle, they took turns sodomizing and raping Mrs. Whitehead; while one did so, the

other kept Amy Whitehead in the vehicle. This minimal summary does not even begin to describe, capture, or convey the indignity, terror, and horror inflicted upon the Whiteheads.

Approximately one week later, Seaton and Jones were arrested; each pleaded guilty to abduction, robbery, and rape. They are serving 125 year sentences in state prison.

At the end of July 1992, approximately three months before the abominable acts committed against Susan and Amy Whitehead, Kmart terminated the contract for security on its large parking lot. It contracted with a new security provider; but, that service did not begin until two days after the abductions. This Mississippi diversity action is premised on the claim that Kmart's failure to provide adequate security for its parking lot was a cause of injuries to Mr. and Mrs. Whitehead and their daughter.

At trial, the Whiteheads' security expert criticized Kmart's lack of policies regarding parking lot security and opined that the lack of uniformed, armed security guards on the night of the abduction created an unsafe environment. Another of the Whiteheads' experts opined that Seaton and Jones were "power reassurance rapists", who probably chose Kmart because of its lack of security in its parking lot, and who would probably have been deterred by the presence of a uniformed security guard.

Kmart's local loss prevention manager testified regarding the measures his personnel took in the absence of the security guards, which primarily involved an unwritten requirement that a loss prevention employee, carrying a two-way radio, patrol the several acre parking lot twice an hour for five to ten minutes.

A jury found for the Whiteheads. It awarded Susan Whitehead $196,000 for past and future medical expenses and $1.5 million for past and future pain and suffering; Amy Whitehead, $100,000 for future medical expenses and $1.2

million for past and future pain and suffering; and Bennie Whitehead, $500,000 for loss of consortium.

Post-verdict, Kmart did *not* seek judgment as a matter of law. Instead, it moved only for a new trial or, alternatively, a remittitur. The motion was denied.

II.

As it did at trial, Kmart acknowledges readily that the crimes committed against Susan and Amy Whitehead are terrible. On the other hand, it notes, correctly, that, notwithstanding how vile the crimes were, the jury could not be improperly influenced by emotion.

Seeking only a new trial, not that we reverse and render, Kmart presents three issues: (1) whether there was a lack of evidence for the jury finding Kmart had a duty to provide private security for the parking lot (and, in conjunction, whether the jury was instructed erroneously and whether the district court committed plain error in admitting testimony); (2) whether the jury awards are excessive, including that they are a result of passion and prejudice; and (3) whether the district court properly applied Mississippi's statute allocating fault among joint tortfeasors. Of course, this being a diversity action, we apply state substantive law. *E.g.*, *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996).

A.

The plaintiff in a Mississippi negligence action has the burden of proving: "a) the *duty* owed him by the [defendant]; b) a *breach* of that duty; c) damages; and d) a causal connection between the breach and the damages, such that the breach is the proximate cause of his injuries". *Crain v. Cleveland Lodge*, 641 So. 2d 1186, 1189 (Miss. 1994) (emphasis in original). Asserting that there was a lack of evidence on which the jury could find Kmart had a duty to provide private security, Kmart advances three bases in support: (1) that there was no evidence showing the requisite

"atmosphere of violence"; (2) that the jury was misled by an instruction regarding Kmart's duty; and (3) that unobjected-to testimony prevented a fair trial.

1.

As noted, following entry of judgment, Kmart moved only for a new trial, expressly pursuant to Fed. R. Civ. P. 59. It did not also move for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50.

Concerning the lack of evidence claim, "[a] trial court should not grant a new trial on evidentiary grounds unless the verdict is against the great weight of the evidence". *Pryor v. Trane Co.*, 138 F.3d 1024, 1026 (5th Cir. 1998) (quoting *Dotson v. Clark Equip. Co.*, 805 F.2d 1225, 1227 (5th Cir. 1986)). The district court has "sound discretion" to grant or deny new trial motions; we will affirm absent "a clear showing that this discretion has been abused". *Pryor*, 138 F.3d at 1026; *see also Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036, 1046 (5th Cir. 1998); *Bernard v. IBP, Inc.*, 154 F.3d 259, 264 (5th Cir. 1998).

It goes without saying that review of the denial of a new trial motion is more limited than when one is granted. *Pryor*, 138 F.3d at 1026. The denial will be affirmed unless, on appeal, the party that was the movant in district court makes a "clear showing" of "' an absolute absence of evidence to support the jury's verdict,' thus indicating that the trial court had abused its discretion in refusing to find the jury's verdict 'contrary to the great weight of the evidence"'. Hidden Oaks, 138 F.3d at 1049 (quoting *Dawsey v. Olin Corp.*, 782 F.2d 1254, 1261 (5th Cir. 1986)) (emphasis added).[1]

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[1] In stating the test for reviewing denials of new trial motions, *Pryor v. Trane Co.*, 138 F.3d 1024, 1026 (5th Cir. 1998) mistakenly quotes the test used instead for reviewing judgment as a matter of law rulings: "we must affirm the verdict unless the evidence-viewed in the light most favorable to the jury's verdict-'points so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a

a.

In the face of the Whiteheads noting this quite narrow standard of review for the denial of a new trial motion, Kmart in its reply brief urges us belatedly to treat its new trial motion as also seeking judgment as a matter of law. Under that standard of review, we determine whether "there is no legally sufficient evidentiary basis for a reasonable jury to find for" the nonmovant. Fed. R. Civ. P. 50(a). Obviously, Kmart's chances would be much improved under this standard; it is far easier to satisfy than the above-discussed requisite showing of "an *absolute absence* of evidence to support the jury's verdict". *Hidden Oaks*, 138 F.3d at 1049 (emphasis added).[2] Simply put, Kmart is trying to mix the proverbial "apples and oranges".

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contrary conclusion"'. This statement is quoted from *Jones v. WalMart Stores, Inc.*, 870 F.2d 982, 987 (5th Cir. 1989), which quoted *Whatley v. Armstrong World Industries, Inc.*, 861 F.2d 837, 839 (5th Cir. 1988), which quoted *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc), *overruled on other grounds*, *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997). The ultimate source of statement in *Pryor* is the cite to *Boeing*, in which our court discussed the test for reviewing judgment as a matter of law rulings, not for reviewing denials of new trial motions. As quoted above, the proper standard of review for denials of new trial motions is contained in *Hidden Oaks*.

[2] As we have noted, the standard of review for appeals from denials of a new trial is far more narrow than that for denials of judgment as a matter of law. At first blush, this appears inconsistent, given that the remedy of a new trial is far less drastic for the nonmovant than suffering judgment as a matter of law. However, the reason for the more narrow standard for review of the denial of new trial motions springs from the lower standard applied by the district court to new trial motions -- it is far less demanding than that for judgment as a matter of law. As noted, the standard for the district court to grant a new trial is whether the verdict is against the great weight of the evidence. *Shows v. Jamison Bedding, Inc.*, 671 F.2d 927, 930 (5th Cir. 1982). On the other hand, the standard for granting judgment as a matter of law is

For starters, Kmart's attempt to switch the standard of review comes far too late. As noted, it was not urged until its reply brief (in a footnote no less). Generally, we do not address points presented for the first time in a reply brief. *See Northwinds Abatement, Inc. v. Employers Ins.*, 69 F.3d 1304, 1308 n.3 (5th Cir. 1995); *Conkling v. Turner*, 18 F.3d 1285, 1299 (5th Cir. 1994); *Unida v. Levi Strauss & Co.*, 986 F.2d 970, 976 n.4 (5th Cir. 1993); *Blumberg v. HCA Management Co., Inc.*, 848 F.2d 642, 646 (5th Cir. 1988);

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whether there is a legally sufficient evidentiary basis for the jury's verdict. *Hiltgen v. Sumrall*, 47 F.3d 695, 700 (5th Cir. 1995).

The standard used by the district court for granting a new trial is lower than that for granting judgment as a matter of law because "[a] verdict can be against the 'great weight of the evidence', and thus justify a new trial, even if there is substantial evidence to support it". *Shows*, 671 F.2d at 930. Additionally, "[t] he trial court in passing on a motion for a new trial need not take the view of the evidence most favorable to the verdict winner, [as is required in passing on motions for judgment as a matter of law,] but may weigh the evidence." *Id.*; *United States for the use of Weyerhaeuser Co. v. Buçon Constr. Co.*, 430 F.2d 420, 423 (5th Cir. 1970). Thus, while the district judge in ruling on a motion for judgment as a matter of law decides a pure, nondiscretionary question of law, that judge in ruling on a new trial motion "may and should exercise a sound discretion". *Weyerhaeuser*, 430 F.2d at 423.

Again, it is because the standard for the district court to grant a new trial is less stringent and is discretionary that the more narrow abuse of discretion standard of review is applied on appeal. *See Weyerhaeuser*, 430 F.2d at 423 (trial court uses its sound discretion in ruling on motion for new trial, and such ruling will only be reviewed upon a showing of "clear abuse of discretion"). In district court, Kmart recognized this more lenient standard utilized by district courts in ruling on new trial motions when, in its brief in support of its new trial motion, Kmart pointed out to the court that it did not have to view the evidence in the light most favorable to the Whiteheads and that it could weigh the evidence.

Knighten v. Commissioner of Internal Revenue, 702 F.2d 59, 60 n. 1 (5th Cir. 1983).

In any event, although here, Kmart belatedly urged the standard of review for judgment as a matter of law, it did not concomitantly seek a judgment in its favor. Instead, throughout its opening and reply briefs, it sought only a new trial. It was not until oral argument, in response to questioning about this anomaly, that Kmart finally asked that we reverse and render. Needless to say, we do not generally consider points raised for the first time at oral argument. *See United States v. Ulloa*, 94 F.3d 949, 952 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1338 (1997); *Zuccarello v. Exxon Corp.*, 756 F.2d 402, 407-08 (5th Cir. 1985) ("[W]hen an appellant raises an issue for the first time at oral argument, the Court ordinarily will not consider it; failure to satisfy the requirements of Rule 28 constitutes a waiver of the issue"); Fed. R. App. P. 28. Obviously, a party is bound by, or limited to, the relief it seeks on appeal. Fed. R. App. P. 28(a)(7) (appellant's brief must contain "[a] short conclusion stating the precise relief sought"); *see Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 54 (1952) (holding that failure to move for judgment after verdict entitled party "only to a new trial, not a judgment in its favor"); *MacArthur v. University of Texas Health Center*, 45 F.3d 890, 897 n.8 (5th Cir. 1995); *Zervas v. Faulkner*, 861 F.2d 823, 832 n.9 (5th Cir. 1988) (stating that if appellant does not move for judgment, only relief appellate court can grant is a new trial); *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 548 (5th Cir. 1974).

Accordingly, while seeking only a new trial, Kmart urges, too late, that we apply a different standard of review. Of course, we, not the parties, determine the proper standard of review. *E.g.*, *United States v. Vontsteen*, 950 F.2d 1086, 1091 (5th Cir. 1992) (en banc) ("[N]o party has the power to control our standard of review.... If neither party suggests the appropriate standard, the reviewing court must determine the proper standard on its own") (emphasis in original); *United States v. Milton*, 147 F.3d 414, 420 n*, *rehearing en banc*

denied, 157 F.3d 905 (5th Cir. 1998); *Izzarelli v. Rexene Products Co.*, 24 F.3d 1506, 1519 n.24 (5th Cir. 1994); *United States v. Pierre*, 958 F.2d 1304 (5th Cir. 1992). For this appeal, that standard, as earlier discussed, is the absolute absence of evidence standard.

But, even assuming *arguendo*, that, for some unique circumstance, we could apply the more lenient standard belatedly urged by Kmart, this case would still *not* be the one for doing so. In belatedly urging that lenient standard, Kmart relies on *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1315 (5th Cir. 1995), *cert. denied*, 516 U.S. 1045 (1996), in which our court allowed a new trial motion to be treated as one for judgment as a matter of law. In *Satcher*, the appellant moved for judgment as a matter of law "at the close of the plaintiff's case and at the close of all the evidence". *Id.* Kmart points out that it made such pre-verdict motions. The similarity ends there.

Satcher noted that the appellant also "reurged the motion for judgment" in its new trial motion and had merely "fail[ed] to style its motion correctly". *Id.* Kmart did not do so here. Contrary to its assertions, it did not merely fail to style its motion correctly; it also failed totally to request judgment as a matter of law. It requested only a new trial or remittitur. (And, as noted *supra*, in its opening brief in support of its new trial motion, it fully developed the evidentiary distinction between motions for new trials and those for judgment as a matter of law, stressing that it was seeking the former.) An appellant who fails to renew its pre-verdict motion for judgment "in the district court is not entitled to rendition of judgment in his favor on appeal, but is at most entitled to a new trial". *Id.* In short, Kmart's reliance on *Satcher* is most ill-advised, if not sanctionable.

Thus, in order to determine whether a new trial is warranted, we review Kmart's sufficiency of the evidence claims under the above discussed abuse of discretion standard. To reverse, we must find an absolute absence of evidence to support the verdict.

b.

Mississippi imposes on business owners "the duty to maintain the premises in a reasonably secure or safe condition" for business patrons or invitees. *Lyle v. Mladinich*, 584 So. 2d 397, 399 (Miss. 1991). This duty includes protection of patrons from the wrongful acts of third parties on the premises.

[A]ny business which invites the company of the public must take "reasonably necessary acts to guard against the predictable risk of assaults". A business proprietor owes a duty to those entering its premises to provide a reasonably safe place.

Id. (quoting *Harris v. Pizza Hut of Louisiana, Inc.*, 455 So. 2d 1364, 1369 (La. 1984)) (internal citations omitted).

Whether the injuries sustained by the Whiteheads were foreseeable is the central issue; "the *foreseeability* of the injury sustained provide[s] the touchstone for liability". *Crain*, 641 So. 2d at 1189 (emphasis in original); *Malloy v. Sears, Roebuck and Co.*, 1997 WL 170313, *4 (N.D. Miss. 1997). In this regard, the intentional criminal acts of third parties do not, by definition, relieve Kmart of liability. *O'Cain v. Harvey Freeman and Sons, Inc.*, 603 So. 2d 824, 830 (Miss. 1991). Rather, "criminal acts be intervening causes which break the causal connection with the defendant's negligent act, *if the criminal act is not within the realm of reasonable foreseeability....* [The answer] depends upon the facts of the case and the duty which the plaintiff asserts for the particular defendant". *Id.* (emphasis in original).

As Kmart notes, foreseeability of the crimes at issue may arise from two sources: "1) actual or constructive knowledge of the assailant's violent nature, or 2) actual or constructive knowledge that an atmosphere of violence exists [on the premises]". *Grisham v. John Q. Long V.F. W. Post*, 519 So. 2d 413, 416-17 (Miss. 1988) (emphasis added); *Crain*, 641 So. 2d at 1189. It is undisputed that the assailants' violent

nature was unknown to Kmart; therefore, foreseeability rests on whether "an atmosphere of violence" existed. Asserting that there was a "complete lack of evidence that an 'atmosphere of violence' existed in the Kmart parking lot", Kmart claims it owed no duty to the Whiteheads to provide security there.

Kmart maintains that the 18 October 1992 crimes were not reasonably foreseeable in the light of the relative lack of crime at Kmart. The Whiteheads introduced evidence of several prior crimes at the parking lot, which had been reported to the police: (1) in July 1991, a customer hit another customer's car with a stick and then attempted to hit him with the stick; (2) in October 1991, a man drove by a customer and snatched her purse out of her shopping cart; (3) in March 1992, two men drove by a customer and grabbed her purse; (4) in April 1992, a man was robbed in his car at gunpoint by another man whom he had recognized and had agreed to drive home; (5) in May 1992, a customer was nearly knocked to the ground as her purse was snatched; (6) in June 1992, a man grabbed a customer's purse and jumped into a car, dragging the customer to the ground; and (7) in October 1992, just days before the abductions, a purse was snatched.

As noted, Kmart contends that this evidence equates, instead, with "a complete lack of evidence that an 'atmosphere of violence' existed in the Kmart parking lot". We disagree.

Lyle involved facts similar to those at hand. A customer at a nightclub was abducted in his car at gunpoint, robbed, beaten, and left in his trunk. *Lyle*, 584 So. 2d at 398. The customer sued the nightclub owners; but, the trial court granted summary judgment, finding a lack of proximate cause. *Id.*

In reversing, the Mississippi Supreme Court noted that there was evidence of several crimes against the person in the area of the nightclub; and that, although there was no security

on the night of the abduction, there had been security in the past. *Id.* at 399. The court held that whether the presence of security on the night in question would have prevented the customer's injuries presented a jury issue, stating that "the jury must determine whether the [defendants'] discontinuance of its previous policy of hiring security personnel to patrol the parking lot constituted a breach of duty and, if so, whether this breach proximately caused or contributed to [plaintiff's] injuries". *Id.* at 400.

Likewise, we cannot say that there was an absence of evidence to show that Kmart's discontinuance of private security guards in its parking lot was a breach of duty. The Whiteheads introduced several incidents of crimes against the person that had occurred on the parking lot, including an armed robbery and several purse snatchings, two of which nearly injured the victims involved. In *Lyle*, the court apparently concluded that the evidence of crimes against the person in the vicinity of the premises and the presence of security in the past were enough to make a jury issue. *Id.* at 399. Likewise, we cannot say that there was no evidence from which the jury could have found that the occurrence of these crimes made the injury to the Whiteheads foreseeable.

Further, we note that most of these prior crimes occurred while Kmart employed outside security, and the Whiteheads' security expert testified that it was impossible to know how many crimes would have occurred in the absence of that security. In light of the fact that several crimes occurred while there was security on the lot, there was no lack of evidence from which the jury could find that Kmart's discontinuance of security for 82 days was a breach of duty.

Kmart relies on *Kelly v. Retzer & Retzer, Inc.*, 417 So. 2d 556 (Miss. 1982). There, the relatives of a young man shot in a McDonald's parking lot sued the owners for not providing adequate security. *Id.* at 557. The plaintiffs introduced evidence of 28 reported crimes in the parking lot in the previous three years, including "three incidents of vandalism, two assaults, one attempted auto theft, one auto

theft, one attempted fraud, an armed robbery in a restroom, one strong armed robbery of a child by a fifteen year old boy, one simple assault, and one unknown complaint". *Id.* at 559. Despite this evidence, the Mississippi Supreme Court upheld the peremptory instruction in favor of the defendant, holding that it was not negligent and that the crime was not foreseeable. *Id.* at 561, 562.

Kelly is distinguishable from this case. In *Kelly*, the person shot was involved in an altercation with others in the parking lot and was shot as he was heading toward his trunk, apparently to retrieve a gun. *Id.* at 558-59. In the light of this, the Mississippi Supreme Court found a "voluntary interference into an already hostile situation [that] was an independent and intervening cause which could not have been reasonably foreseen or prevented by McDonald's". *Id.* at 562. There is no evidence that Susan and Amy Whitehead acted in any manner to invite the harm inflicted upon them.

Further, in *Kelly*, there was undisputed evidence that an assistant manager was required to patrol the parking lot every half hour, that loitering customers were advised to buy something or leave if they remained in the lot for two to three minutes, and that the assistant manager immediately called police when he learned of the altercation. *Id.* at 562. Here, there was conflicting evidence at trial regarding whether the loss prevention personnel actually patrolled the parking lot twice an hour, and the evidence indicated that no anti-loitering policy existed.

This case is also distinguishable from *Crain*, where the plaintiff sued the Moose Lodge for an assault in its parking lot. The court first held that Crain's injury was not foreseeable because there had been only two reports of crime on the premises in the past year (both involving property crimes) and only 11 crimes against the person in the vicinity of the Moose Lodge in the past five years. *Crain*, 641 So. 2d at 1192. Further, the court held that the plaintiff did not show proximate cause between the lack of lighting in the Moose Lodge parking lot and his injuries. *Id.*

Here, however, the Whiteheads introduced evidence of several prior crimes against the person occurring in the Kmart parking lot. Further, the Whiteheads' security and rape experts testified that the presence of uniformed security guards probably would have deterred the assailants. It is within the province of the jury to decide how much weight to give this expert testimony, *Newport Ltd. v. Sears, Roebuck & Co.*, 6 F.3d 1058, 1069 (5th Cir. 1993), and we cannot say there was an absence of evidence for the jurors to have found that this crime was foreseeable or that the lack of security in the lot was a proximate cause of the injuries to the Whiteheads.

In the light of the evidence introduced by the Whiteheads, there was not an absolute absence of evidence to support the jury's verdict. Thus, concerning Kmart's lack of evidence claim, the district court did not abuse its discretion in denying Kmart's new trial motion.

2.

In conjunction with the foregoing evidentiary challenge, Kmart asserts that "[t]he jury may have overlooked the *lack* of evidence of any 'atmosphere of violence' because of the jury charge". (Emphasis added.) In this regard, it points to the following objected-to jury instruction, regarding Kmart's ability to rely upon the local police:

Therefore, you are instructed that the defendant, Kmart Corporation, is not entitled to rely upon and cannot rely upon law enforcement agencies such as the Jackson Police Department and/or Hinds County Sheriffs Department to discharge its nondelegable duty to keep the Kmart store and parking lot in a reasonably safe and secure condition.

Kmart asserts that this is an incorrect statement of the law, misled the jury, and prejudiced Kmart, resulting in reversible error.

As stated in *Davis v. Avondale Indus., Inc.*, 975 F.2d 169, 174-75 (5th Cir. 1992):

On appeal, the charge must be considered as a whole, and so long as the jury is not misled, prejudiced, or confused, and the charge is comprehensive and fundamentally accurate, it will be deemed adequate and without reversible error. This Court will only reverse when the charge as a whole leaves us with substantial and ineradicable doubt whether the jury has been properly guided in its deliberations.

Nevertheless, a defendant is "entitled to the submission of an appropriate instruction on its theory of defense," and we have not hesitated to reverse where, despite proper request and objection, the charge fails to in any adequate way to present a theory of defense, or recovery, properly raised by the evidence.

(Internal citations omitted.) *See also National Union Fire Ins. Co. v. Cagle*, 68 F.3d 905, 909 (5th Cir. 1995) (quoting *Bender v. Brumely*, 1 F.3d 271, 276 (5th Cir. 1993)); *Roberts v. Wal-Mart Stores, Inc.*, 7 F.3d 1256, 1258 (5th Cir. 1993) ("The function of the reviewing court with respect to instructions is to satisfy itself that the instructions show no tendency to confuse or mislead the jury with respect to the applicable principles of law").

Kmart maintains that the instruction misinformed the jury, claiming that the instruction told the jury that Kmart could not rely on the police and had to provide its own security; and that, because "[t]he jury was already misled by [Whiteheads'] counsel's referral to the so-called 'gap' in security services to conclude a duty to provide security guards existed[,] this jury instruction sealed Kmart's fate on the critical legal issue". In making this claim, Kmart relies on *Kelly*, in which the court stated that it was "of the opinion the responsibility of enforcing the law is on the government chosen by the people of the area and does not necessarily rest upon the business involved". *Kelly*, 417 So. 2d at 563.

But, after the challenged instruction, the district court added the following:

So you are instructed that a retailer is not obligated to hire a security guard or to take other precautions against a crime unless it reasonably should expect that ordinary police protection is inadequate. The duty of a store owner, therefore, does not extend to the protection of customers from the criminal acts of third parties unless the risk of this crime on the premises was sufficiently and reasonably foreseeable to require special protection through security measures.

In the light of the instruction as a whole, Kmart's contention that the instruction implied that Kmart was *required* to provide private security is unavailing. The district court properly instructed the jury that it was to find a duty to provide private security *only* if the jury found first that the attack on Susan and Amy Whitehead was reasonably foreseeable.

Further, the Mississippi Supreme Court addressed a similar issue in *McWilliams v. City of Pascagoula*, 657 So. 2d 1110 (Miss. 1995), in which the plaintiffs challenged a jury instruction that "the responsibility of enforcing the law and protecting persons from criminal acts rests with the police department". *Id.* at 1112. The court held that this instruction, coupled with the denial of an instruction on premises liability, was erroneous because it "left the jury with the impression that the [premises owner] had no obligation to provide for [the plaintiff's] safety". *Id.* This further contradicts Kmart's contention that the instruction misstated Mississippi law.

Accordingly, the instruction, taken as a whole, did not mislead the jury with regard to Kmart's ability to rely on the police to keep its parking lot safe for its customers. Taken as a whole, the instruction correctly states the law in Mississippi that a premises owner has a duty to keep its invitees safe from the reasonably foreseeable criminal acts of third parties.

3.

Finally, similar to its complaint about the jury instruction, Kmart asserts that, by the introduction of inadmissible hearsay evidence, the jury was misled regarding Kmart's duty. The Whiteheads' security expert testified that a supervisor with the company that had provided security for Kmart had warned Kmart, prior to the crimes in this case, not to discontinue the security because of the crime in the parking lot. Kmart did not object at trial; therefore, as Kmart acknowledges, we are limited to reviewing only for plain error. Fed. R. Evid. 103(d); *Barber v. Nabors Drilling U.S.A., Inc.*, 130 F.3d 702, 710 (1997), *rehearing denied*, 137 F.3d 1353 (5th Cir. 1998).

Kmart maintains that the repeated references to the alleged warning by the Whiteheads' security expert, and by their counsel during closing argument, substantially affected its right to a fair trial. Although recognizing that experts may rely upon hearsay that is trustworthy, Fed. R. Evid. 703; *Christopherson v. Allied-Signal Corp.*, 939 F.2d 1106, 1114 (5th Cir. 1991)(en banc), *overruled on other grounds*, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 n.5 (1993), Kmart asserts that this hearsay was not reliable because it resulted from an interview conducted by the Whiteheads' counsel.

"[U]nobjected-to hearsay may be considered by the trier of fact for such probative value as it may have." *Peaches Entertainment v. Entertainment Repertoire*, 62 F.3d 690, 694 (5th Cir. 1995) (quoting *Flores v. Estelle*, 513 F.2d 764, 766 (5th Cir. 1975)). In reviewing such unobjected to evidence only for plain error, we have discretion to correct an error if, "when examined in the context of the entire case, [it] is so obvious and substantial that failure to notice and correct it would affect the fairness, integrity, or public reputation or judicial proceedings". *Peaches Entertainment*, 62 F.3d at 694 (citation omitted).

Even assuming error, it falls far short of satisfying the standard for plain error reversal. Further, we are not unmindful of the apparently conscious choice that Kmart's counsel made at trial, once the testimony at issue was given, of choosing to attack its credibility, rather than object to its introduction and request a curative instruction. As noted, this choice has limited us to plain error review. *Cf. United States v. Handly*, 591 F.2d 1125, 1128 (5th Cir. 1979) ("Where, however, the record indicates that defense counsel's failure to object to an improper comment was part of his defense strategy, then the defendant will not be heard to claim he was prejudiced by the prosecutor's indiscretions").

In sum, in regard to Kmart's asserted bases for a new trial on liability, there was not an absence of evidence to prove that Kmart breached its duty to the Whiteheads; the challenged jury instruction was not inaccurate; and the admission of the challenged testimony did not constitute plain error. Accordingly, as to liability, the district court did not abuse its discretion in denying Kmart's new trial motion.

B.

Maintaining that the damages of $3.4 million are excessive, Kmart advances two independent bases: that they shock the judicial conscience; and, that they are the result of passion and prejudice, caused by improper closing argument by the Whiteheads' counsel. Because we conclude that the jury was so influenced by passion and prejudice, we do not reach whether the awards are otherwise excessive.

1.

The denial of a new trial on the issue of damages is reviewed for abuse of discretion. *E.g., Colburn v. Bunge Towing, Inc.*, 883 F.2d 372, 375 (5th Cir. 1989); *Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778, 781 (5th Cir. 1983). A new trial, rather than a remittitur, is the appropriate remedy when a jury award results from passion and prejudice. *E.g., Caldarera*, 705 F.2d at 782. In that regard, Kmart asserts, *inter alia*, that, during closing argument, one of the

Whiteheads' counsel emphasized improperly Kmart's status as an out-of-state corporation; invoked "Golden Rule" arguments; and made other "blatantly prejudicial" comments.

"The propriety of an argument is a matter of federal trial procedure under *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958), and, therefore, in a diversity case, subject to federal rather than state law." *Westbrook v. General Tire and Rubber Co.*, 754 F.2d 1233, 1239-40 (5th Cir. 1985). No doubt, final arguments must be forceful. And, generally, counsel are allowed a "reasonable latitude" in making them. *Edwards v. Sears, Roebuck and Co.*, 512 F.2d 276, 283 (5th Cir. 1975). "When a closing argument is challenged for impropriety or error, the entire argument should be reviewed within the context of the court's rulings on objection, the jury charge, and any corrective measures applied by the trial court." *Westbrook*, 754 F.2d at 1238.

Our task is complicated by Kmart's failure to object to almost all of the statements now challenged. Although we may review such challenges even where no contemporaneous objection was made, *Liner v. J.B. Talley and Co., Inc.*, 618 F.2d, 327, 329 (5th Cir. 1980), we are, of course, extremely reluctant "to address for the first time on review errors which the trial court was not given the opportunity to consider and correct". *Edwards*, 512 F.2d at 286, 288; *Liner*, 618 F.2d at 330 (expressing "extreme reluctance to grant relief in the absence of an objection"). This extreme reluctance is grounded in several obvious reasons. Among other things, it is in keeping with the great deference we accord the decision by the trial judge, who was present and heard the evidence, to deny a new trial motion. *Gautreaux v. Scrulock Marine, Inc.*, 84 F.3d 776, 783 (1996), *rev'd on other grounds*, 107 F.3d 331 (5th Cir. 1997)(en banc); *Guaranty Service Corp. v. American Employers' Ins. Co.*, 893 F.2d 725, 729 (5th Cir. 1990) (decision by trial judge to grant or deny new trial not lightly reversed).

At least a few pertinent objections were made during the Whiteheads' closing argument, as discussed *infra*. And, for the unobjected to, but now challenged comments, consistent with plain error review, we must reverse when necessary to preserve "substantial justice". Fed. R. Civ. P. 61; *Hall v Freese*, 735 F.2d 956, 963 (5th Cir. 1984); *Westbrook*, 754 F.2d at 1241; *Edwards*, 512 F.2d at 286. In sum, in order to serve "the interests of justice", we must abandon our deference for the district court's decision. *Westbrook*, 754 F.2d at 1241.

Obviously, awards influenced by passion and prejudice are the antithesis of a fair trial. This case was fertile ground for such bias. By its very nature, it was extremely emotional. Indeed, part of the damages involved "emotional distress". But, this did not permit appeals to emotion -- quite the contrary. In cases of this type, counsel must be unusually vigilant and take the greatest care to avoid and prevent such appeals, in order to keep the verdict from being infected by passion and prejudice. Unfortunately, the Whiteheads' counsel did just the opposite. Our close and repeated review of the Whiteheads' closing argument convinces us that it caused the verdict to be so influenced.

First, the Whiteheads' counsel made statements that appealed to local bias. On numerous occasions, he reminded the jury that Kmart is a national, not local, corporation, with its principal place of business in Troy, Michigan. And, he contrasted that with his status as a Mississippi resident and, implicitly, his clients' similar status: "*as a little old lawyer down here in Mississippi, to take on a national corporation*, I knew I had to bring in the best experienced person in security that I knew"; and "[n]ow when I, as a lawyer *here in Mississippi*, bring a legal action against a *national corporation* -- having done this a few years -- they are tough cases". (Emphasis added.)

Another example of the emphasis on Kmart being an out-of-state corporation follows:

The problem is -- *way up there in Troy, Michigan -- way up there in Troy, Michigan*, where they decide to write a two or three inch thick loss prevention manual, they don't think about the customers' safety and security in the parking lot. Because they are more concerned about profits and not people.

(Emphasis added.) That this blatant appeal to sectionalism would be made in a federal court in this day and time is nothing short of amazing.

This repeated emphasis on Kmart being a national, not local, corporation was exacerbated by counsel's shameless refusal to abide by the district court's sustaining Kmart's objections to counsel's comments concerning Kmart not presenting proof about its security measures through non-local witnesses. As noted, Kmart presented such proof through the loss prevention manager at the Kmart store in question. He also served as Kmart's corporate representative at trial. Consistent with emphasizing that Kmart was not a local corporation, the Whiteheads' counsel stated:

It bothers me and I hope it bothers you, that if what I presented to you in this case about the corporate negligence in security was not true, why didn't we ... see someone from the national company come into this courtroom and try to explain their conduct.

Immediately after the court sustained Kmart's objection and gave a curative instruction (that a defendant has no obligation to produce any witnesses), the Whiteheads' counsel returned to this tactic, in total defiance of the district court's ruling, until counsel was interrupted by the same objection. Before being interrupted, he stated: "We heard no one from the national corporation -- the national corporation come here and explain why--". The district court reminded the Whiteheads' counsel that it had sustained the objection and gave another curative instruction.

In his rebuttal closing argument, and notwithstanding the court's having earlier sustained Kmart's objections, the Whiteheads' counsel returned to this improper tactic:

> [Kmart's] whole ploy in this case was to come in and attack the plaintiffs' case, attack their witnesses, be critical of them and have a nice man from Jackson [Kmart's local loss prevention manager/corporate representative] and a nice, good, mild-mannered lawyer trying to make you think: Well, they are just real nice folks, and they just didn't do anything wrong.
>
> . . . .
>
> Shame on Kmart. *Shame on the corporation for not sending representatives here to testify about why they don't have a policy. Shame on them for having a local man sit here and take the fall....*

(Emphasis added.) Once again, the district court sustained the objection by Kmart.

In short, counsel twice violated the court's ruling on Kmart's objection. Counsel's continued improper references to Kmart using a local representative/witness served to do nothing but appeal to prejudice and passion.[3] It goes without

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[3] Although we are reviewing a cold record, the heated, emotional atmosphere at trial is reflected by the Whiteheads' counsel's response, during his rebuttal closing argument, to Kmart's objection, in which it noted to the court, consistent with the court's earlier ruling on the similar objection, that, had they felt it important, the Whiteheads could have introduced testimony by a non-local Kmart representative. Instead of responding to the court, as the court had had to instruct counsel earlier in the trial, the Whiteheads' counsel responded to Kmart's counsel concerning his statement that the Whiteheads could have offered non-local Kmart testimony; the Whiteheads' counsel responded, "And so could you".

saying that such conduct and comments have no place in a federal court. Worse still, they prevent a fair trial.

"Arguments which invite a jury to act on behalf of a litigant become improper 'conscience of the community' arguments when the parties' relative popular appeal, identities, or geographical locations are invoked to prejudice the viewpoint of the jurors". *Guaranty Service Corp.*, 893 F.2d at 729. Again, such arguments distract the jury from its "sworn duty to reach a fair, honest and just verdict according to the facts and evidence presented at trial". *Westbrook*, 754 F.2d at 1238. When such arguments are used, as here, against out-of-state parties, they "carry the potential of substantial injustice". *Id.* at 1239.

Counsel made other highly prejudicial statements during closing argument. For example, he stated that Susan Whitehead's last thought before death would be of the rapists, and that Amy Whitehead needed to be compensated to avoid thoughts, on her wedding night, of her mother's rape. Neither person so testified. Nor is this fair comment on the evidence. As another example, counsel, again going outside the evidence and again not engaging in fair comment on it, told the jury that, other than to testify, "the Whiteheads have not been in the courtroom. And you know why. It's just too painful for them to listen to the horrors and the events of what happened in the liability testimony".

In sustaining the objection, the court stated it would take up another matter later. While the jury was deliberating, the district court sanctioned the Whiteheads' counsel $1,000 for violating its earlier warning to respond to the court, not to counsel. (That counsel would even need to be instructed to respond to the court, not to opposing counsel, speaks volumes.) One of the reasons presented to the district court by the Whiteheads' counsel against imposing the sanction was that "[t]his is a very emotional trial". (Kmart counsel also urged that the sanction not be imposed.) As noted, it is in such emotional trials that counsel must keep emotion within its proper bounds.

Such statements could serve no purpose other than to inflame the passions of the jury to return large awards. They are similar to those found to be prejudicial in *Edwards*, where, during closing argument in a wrongful death case, counsel, *inter alia*, invoked images of the decedent's children crying at the grave and waiting for their father on the porch steps. *Edwards*, 512 F.2d at 285-86.

Finally, counsel engaged in an improper "Golden Rule" argument. "This court has forbidden plaintiff's counsel to explicitly request a jury to place themselves in the plaintiffs position and do unto him as they would have him do unto them." *Stokes v. Delcambre*, 710 F.2d 1120, 1128 (5th Cir. 1983). Such arguments encourage the jury to "decide the case on the basis of personal interest and bias rather than on the evidence". *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493, 496 (5th Cir. 1982) (quoting *Ivy v. Security Barge Lines, Inc.*, 585 F.2d 732, 741 (5th Cir. 1978), *rev'd on other grounds*, 606 F.2d 524 (5th Cir. 1979)(en banc)).

The Whiteheads' counsel stated:

The incident took approximately two hours from when they were abducted to when they were released. And I calculated it, and that's 7,200 seconds. And I want for you to just for a couple of seconds to see when I say start, that's ten seconds. Ten seconds.

And can you imagine how it would feel to have a knife in your side or a knife on your leg or a pistol at your neck for ten seconds?

(Emphasis added.) Even assuming he was not explicitly invoking the Golden Rule, counsel was clearly inviting the members of the jury to put themselves in the place of the plaintiffs when deciding damages.

Of course, we need not find that each statement, taken individually, was so improper as to warrant a new trial. Rather, taken as a whole, these comments prejudiced the jury's findings with respect to damages. Even hough most

of the challenged statements were not objected to, substantial injustice would result, contrary to Rule 61, were we to affirm the awards.

That the awards were improperly influenced by passion and prejudice is indicated by their size. Without deciding that the awards are excessive, we note that, at the very least, they are at the high end of the spectrum for such damages. This large verdict, when accompanied by counsel's improper arguments, further indicates that the jury was influenced by the prejudicial statements. *See Westbrook*, 754 F.2d at 1241 ("[A]ppeals to local bias against an outsider are prejudicial, and a large verdict accompanied by such appeals leads us to conclude they had an influential impact on the jury's deliberations").[4]

2.

As noted, a new trial, rather than remittitur, is the appropriate remedy when a jury award results from passion and prejudice. *Caldarera*, 705 F.2d at 782. Here, the new trial need be only on damages. This is appropriate where the "factual questions relating to damages are sufficiently distinct and independent of those questions pertaining to liability". *Westbrook*, 754 F.2d at 1242. That is the situation here. Additionally, Kmart does not claim that the entire

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[4] Again, we are most cognizant of the fact that the trial judge is in a far, far better position than we to gauge the effect of closing arguments; he is present and hears the statements, while we are limited to the cold record. *See Caldarera*, 705 F.2d at 782 ("Our review is not only hindsight, but is based on a written record with no ability to assess the impact of the statement on the jury or to sense the atmosphere of the courtroom"). However, our insight into what took place during closing argument is sharpened and illumined by the actions by the Whitehead's counsel on appeal-specifically, extremely inappropriate appeals to emotion at oral argument, and, even while acknowledging the exclusion of certain evidence offered by the Whiteheads (concerning Kmart's duty to provide security), nevertheless presenting that excluded evidence in his brief.

verdict was influenced by passion and prejudice, only the damages. And, as previously noted, the damage awards were high; this also indicates the jury's strong belief that Kmart was liable. *See id.* ("[T]he extremely high amount of the award ... suggests the jury had little doubt that [the defendant] should be held responsible for [causing the plaintiff's] injuries").

C.

Finally, even though we are remanding for a new trial on damages, it is appropriate now to address Kmart's contentions regarding allocation of fault under Mississippi's statute limiting joint and several liability, Miss. Code Ann. § 85-5-7. Under subsection (3), with certain exceptions, a joint tortfeasor's liability is limited to "the amount of damages allocated to him in direct proportion to his percentage of fault". § 85-5-7 (3). Of course, we review questions of statutory interpretation de novo. *E.g.*, *Spacek v. Maritime Ass'n*, 134 F.3d 283, 288 (5th Cir. 1998).

The district court denied Kmart's pretrial request for specific mention of the assailants in the verdict form under subsection (7) of § 85-5-7 (requiring that "the trier of fact shall determine the percentage of fault for each party alleged to be at fault"). The order did permit Kmart to assert an "empty chair" defense at trial under the "percentage of fault" language of subsection (3). The jury instructions, however, contained no "percentage of fault" language. (Earlier, Kmart had moved to join the assailants as co-defendants; but, it withdrew the motion.)

Section 85-5-7 became effective 1 July 1989, during a wave of legislative modification of joint-and-several liability in favor of allocation schemes among tortfeasors. 1989 Miss. Laws Ch. 311; *e.g.*, Kathleen M. O'Connor and Gregory P. Sreenan, *Apportionment of Damages: Evolution of a Fault-Based System of Liability for Negligence, 61 J. Air Law & Comm.* 365, 374-81 (1996). This legislative activity followed the shift from contributory to comparative

negligence tort regimes. *E.g.*, *id.* at 368-73. Mississippi was first in this trend, adopting a pure comparative negligence statute in 1910. Miss. Code Ann. § 11-7-15; Keeton et al., Prosser and Keeton on Torts 471 (5th ed. 1984).

Both modifications changed all-or-nothing regimes to ones dividing liability based on respective fault: comparative negligence so dividing liability between the plaintiff and defendant, allocation so dividing liability among defendants. Over 35 States now use comparative negligence and allocate liability among defendants rather than imposing unqualified joint-and-several liability. Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 Tenn. L. Rev. 199, 203 (1990).

Legislative history and subsequent judicial interpretation shed little light on the contours of allocation in Mississippi. Only seven majority opinions in either federal or Mississippi state court mention § 85-5-7 at all; none address our issues squarely. Two federal district courts have faced issues tangential to our inquiry. *See Chism v. Burlington Northern Railroad Co.*, 1996 WL 408907, *3 (N.D. Miss. 1996) (unpublished) (applying § 85-5-7(3) to support the joinder of other defendants, resulting in the loss of diversity and remand to state court); *White v. Esmark Apparel, Inc.*, 788 F. Supp. 907, 908-09 (N.D. Miss. 1992) (declining to allow "phantom party" pursuant to allocation under § 85-5-7(3)). Remaining opinions address other subsections. *See Mississippi Transp. Comm'n v. Jenkins*, 699 So. 2d 597, 600 (Miss. 1997) (applying § 85-5-7(5) and reaffirming that the section does not affect sovereign immunity); *Midsouth Rail Corp. v. Citizens Bank & Trust Co., Inc.*, 697 So. 2d 451, 452 (Miss. 1997) (contribution rules of § 85-5-7(4) do not apply to damages incurred before its effective date); *Adkinson v. International Harvester Co.*, 975 F.2d 208, 218 n.7 (5th Cir. 1992) (same); *Stringfellow v. Reed*, 739 F. Supp. 324, 326 (S.D. Miss. 1990) (disallowing the use of § 85-5-7 to obtain a contribution from an employer immune under workman's compensation law); *Garriga v. Nationwide Mut. Ins. Co.*, 813 F. Supp. 457, 463 (S.D. Miss. 1993) (referring briefly to

§ 85-5-7's "joint tortfeasor" locution in remaining areas of joint and several liability).

Four concurrences and dissents also refer to the section. *See Robles By and Through Robles v. Gollott and Sons Transfer and Storage, Inc.*, 697 So. 2d 383, 386 (Miss. 1997) (Prather, P.J., concurring) (noting question whether § 85-5-7 compels contribution absent a joint judgment); *Mississippi Power & Light Co. v. Lumpkin*, 1998 WL 80164, *28 (Miss. 1998) (Smith, J., dissenting in part) (arguing for an application of § 85-5-7 to allow assessment of a plaintiff's negligence); *King v. City of Jackson*, 667 So. 2d 1315, 1317-18 (Miss. 1995) (Banks, J., dissenting) (mentioning § 85-5-7 in the course of explaining when plaintiff driver's negligence could be considered); *Sweeney v. Preston*, 642 So. 2d 332, 343 (Miss. 1994) (Hawkins, C.J., dissenting) (noting that use of § 85-5-7 might cause a conflict of interest).

The section provides:

(1) As used in this section "fault" means an act or omission of a person which is a proximate cause of injury or death to another person or persons, damages to property, tangible or intangible, or economic injury, including but not limited to negligence, malpractice, strict liability, absolute liability or failure to warn. *"Fault" shall not include any tort which results from an act or omission committed with a specific wrongful intent.*

(2) Except as may be otherwise provided in subsection (6) of this section, in any civil action based on fault, the liability for damages caused by two (2) or more persons shall be joint and several only to the extent necessary for the person suffering injury, death or loss to recover fifty percent (50%) of his recoverable damages.

(3) Except as otherwise provided in subsections (2) and (6) of this section, in any civil action based on fault, the liability for damages caused by two (2) or more persons shall be several only, and not joint and several and a joint tort-feasor shall be liable only for the amount of damages allocated to

him in direct proportion to his percentage of fault. In assessing percentages of fault an employer and the employer's employee or a principal and the principal's agent shall be considered as one (1) defendant when the liability of such employer or principal has been caused by the wrongful or negligent act or omission of the employee or agent.

(4) Any defendant held jointly liable under this section shall have a right of contribution against fellow joint tort-feasors. A defendant shall be held responsible for contribution to other joint tort-feasors only for the percentage of fault assessed to such defendant.

(5) Nothing in this section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly noted herein.

(6) Joint and several liability shall be imposed on all who consciously and deliberately pursue a common plan or design to commit a tortious act, or actively take part in it. Any person held jointly and severally liable under this section shall have a right of contribution from his fellow defendants acting in concert.

(7) In actions involving joint tort-feasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault.

(8) Nothing in this section shall be construed to create a cause of action. Nothing in this section shall be construed, in any way, to alter the immunity of any person.

Miss. Code Ann. § 85-5-7 (emphasis added).

The general rule is stated in subsection (3): "[A] joint tort-feasor shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault." § 85-5-7(3).

Exceptions for common schemes and for recovery of at least 50 percent of the damages are stated in subsections (6) and (2).

At issue is the application of the allocation in subsection (3) to Seaton and Jones, who engaged in the criminal conduct against Susan and Amy Whitehead. Because Seaton and Jones are intentional tortfeasors and non-parties in this action, we are faced with two separate issues of application of § 85-5-7(3). Each issue concerns the total of which the defendant's "percentage of fault" is a percentage: does it include intentional torts, and does it include the fault of non-parties? No authority need be cited for the rule that the starting point for answering these questions is the plain language of the statute.

We need not answer the second question, because the definition of "fault" in subsection (1) provides a clear and immediate answer to the first question: "fault" does *not* include intentional torts. The words of the allocation requirement in subsection (3), "in direct proportion to his percentage of *fault*" (emphasis added), therefore preclude allocation of damages between a negligent and an intentional tortfeasor. Kmart's percentage of "fault" here is 100 percent, because intentional tortfeasors Seaton and Jones have no "fault" as defined by subsection (1).

Our reading, mandated by the plain wording of the statute, is confirmed by decisions from at least 15 other States that have addressed apportionment of fault between a negligent defendant and an intentional tortfeasor. Arizona, California, Colorado, Connecticut, Kentucky, New Jersey, New Mexico, New York, and Utah allow such comparison. *See Hutcherson v. City of Phoenix*, 961 P.2d 449, 451-53 (Ariz. 1998); *Weidenfeller v.* (Ct. App. 1991); *Pamela B. v. Star & Garter*, 2 Cal. Rptr.2d 14, 16 (Ct. App. 1991); *Pamela B. v. Hayden*, 31 Cal. Rptr.2d 1033, 1039 (9th Cir. 1993); *Harvey v. Farmers Insurance Exchange*, 1998 WL 679864, *3-*4 (Colo. Ct. App. 1998); *Bhinder v. Sun Company, Inc.*, 717 A.2d 202, 208-212 (Conn. 1998); *Roman Catholic Diocese of Covington v. Secter*, 966 S.W.2d 286, 291 (Ky. Ct. App. 1998); *Blazovic v. Andrich*, 590 A.2d 222, 230 (N.J. 1991); *Steele v. Kerrigan*, 689 A.2d 685, 690-691 (N.J. 1997); *Reichert v. Atler*, 875 P.2d 379, 381 (N.M. 1992); *Barth v.*

Coleman, 878 P.2d 319, 321-22 (N.M. 1994); *Siler v. 146 Montague Assocs.*, 652 N.Y.S.2d 315, 319-20 (App. Div. 1997) (but see *Morales v. County of Nassau*, 667 N.Y.S.2d 239, 240 (Sup. Ct. 1997), distinguishing Siler based on "public policy considerations"); *Field v. Boyer Company, L.C.*, 952 P.2d 1078, 1080 (Utah 1998). Louisiana has a case-by-case rule. *Veazey v. Elmwood Plantation Assocs.*, 650 So. 2d 712, 717-19 (La. 1995). North Dakota decided against comparison under an old law, but new legislation may change the result. *McLean v. Kirby Co.*, 490 N.W.2d 229, 244 (N.D. 1992). Florida, Kansas, Tennessee, and Washington have held that the responsibility of intentional and negligent tortfeasors may not be compared. *Merrill Crossings Associates v. McDonald*, 705 So. 2d 560, 562-63 (Fla. 1997); *Kansas State Bank & Trust Co. v. Specialized Transportation Services, Inc.*, 819 P.2d 587, 605-06 (Kan. 1991); *Gould v. Taco Bell*, 722 P.2d 511, 516-17 (Kan. 1986); *M. Bruenger & Co., Inc., v. Dodge City Truck Stop, Inc.*, 675 P.2d 864, 869 (Kan. 1984); *Turner v. Jordan*, 957 S.W.2d 815, 821-23 (Tenn. 1997); *Welch v. Southland Corp.*, 952 P.2d 162, 165 (Wash. 1998).

None of the statutes construed to allow comparison between negligent and intentional tortfeasors, however, have had such an explicit definition of "fault" as does § 85-5-7(1). *See* Ariz. Rev. Stat. § 12-2506(A), 12-2506(F)(2) (1997) (allocating liability based on "defendant's percentage of fault"; defining "fault" as "an actionable breach of legal duty"); Cal. Civ. Code § 1431.2 (1997) (referring to "defendant's percentage of fault", without defining "fault"); Colo. Rev. Stat. § 13-21-111.5(1) (1998) (limiting liability to defendant's "degree or percentage of the negligence or fault", without defining "fault"); N.J. Stat. Ann. § 2A:15-5.3(c) (West 1997) (referring to defendant's "negligence or fault", without defining "fault"); N.M. Stat. Ann. § 41-3A-1 (Michie 1998) (referring to "ratio of such defendant's fault to the total fault attributed to all persons", without defining "fault"); N.Y. C.P.L.R. 1601 (McKinney 1997) (allocating liability "in accordance with the relative culpability" of persons

causing damage); Utah Code Ann. §§ 78-27-39(1), 78-27-37 (2) (1998) (limiting liability to defendants' "proportion of fault"; defining "fault" as "any actionable breach of legal duty, act or omission"). (Connecticut and Kentucky base apportionment to intentional tortfeasors on common-law principles, rather than on statutes. *See Bhinder*, 717 A.2d at 208; *Secter*, 966 S.W.2d at 291.)

Needless to say, statutory definitions of "fault" may resolve whether apportionment to intentional tortfeasors is appropriate. *See Hutcherson*, 961 P.2d at 452 ("'The legislature defined fault broadly to include all types of fault committed by all persons'", quoting *Thomas v. First Interstate Bank*, 930 P.2d 1002, 1003 (Ariz. App. 1996)); *Veazey*, 650 So. 2d at 717 (finding that courts apportioning liability to intentional tortfeasors "explicitly or implicitly, have construed the term 'fault' contained in various provisions of the comparative fault law as encompassing both unintentional and intentional conduct"); *McLean*, 490 N.W.2d at 244 (noting that new statute directs comparison of "fault", rather than comparison of "negligence", possibly changing scope of apportionment); *Harvey*, 1998 WL 679864, *3 ("we conclude that the word 'fault' as it appears in the statute was intended to include a broad range of blameworthy conduct, including intentional torts"); *Field*, 952 P.2d at 1080 ("we find that [the statutory] definition of 'fault' encompasses both negligent and intentional conduct"); *Welch*, 952 P.2d at 634 ("the statutory definition of fault does not include intentional acts or omissions").

But, again, the explicit statement in § 85-5-7(1) that "fault" does *not* include intentional torts correspondingly resolves the issue presented by the Mississippi statute. Therefore, the exclusion of the assailants from the verdict form and omission of their share of fault was proper.

III.

Accordingly, that portion of the judgment as to liability is AFFIRMED; that portion as to damages is REVERSED; and

this case is REMANDED for a new trial only on the issue of damages.

AFFIRMED in PART; REVERSED in PART; and REMANDED

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-60153

BENNIE WHITEHEAD; ET AL.,
Plaintiffs,

v.

FOOD MAX OF MISSISSIPPI, INC.; ET AL.,
Defendants.

Appeal from the United States District Court
for the Southern District of Mississippi.

Before: KING, Chief Judge, and JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, DENNIS, and CLEMENT, Circuit Judges.[5]

ORDER:

IT IS ORDERED that Appellant's 19 June 2003 motion for leave to supplement the record on appeal and 19 June 2003 petition for rehearing of the 29 May 2003 en banc decision in this appeal are *DENIED*, with one exception: wording in the dissent, claimed by Appellant/Petitioner to be incorrect, was previously revised – "called upon" was changed to "required". *See* 2003 U.S. App. Lexis 10669, at 48.

ENTERED FOR THE COURT:

// S //
Rheas Hawkins Barksdale
United States Circuit Judge

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[5] Judge Prado, who joined our court subsequent to *en banc* oral argument, did not participate.